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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 122

JULIUS FISHER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 9, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 18 1945

Joseph W. Stewart

CLERK

JOINT APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA

JANUARY TERM, 1945

No. 8809

JULIUS FISHER, APPELLANT

v.

UNITED STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals

DISTRICT OF COLUMBIA

JANUARY TERM, 1945

No. 8809

JULIUS FISHER, APPELLANT

v.

UNITED STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

G. J. No. 29196.
Criminal No. 73,393.
First Degree Murder.

District Court of the United States for the District of Columbia

Holding a Criminal Term—January Term, A. D. 1944

District of Columbia, ss:

The Grand Jurors of the United States of Amercia, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Julius Fisher, on, to wit, the first day of March 1944, and at and within the District of Columbia aforesaid, contriving and intending to kill one Catherine Cooper Reardon, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did fix and fasten about the neck and throat of her, the said Catherine Cooper Reardon, his hand or hands—but whether it was one of his hands or both his hands is to the Grand Jury aforesaid unknown—and that he, the said Julius Fisher, with his hand or hands so as aforesaid fixed and fastened

about the neck and throat of her, the said Catherine Cooper Reardon, then and there feloniously, wilfully, purposely and of his deliberate and premeditated malice did choke and strangle the said Catherine Cooper Reardon, of which said choking and strangling she, the said Catherine Cooper Reardon, on, to wit, the said first day of March 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, in the manner and by the means aforesaid, feloniously, wilfully, purposely and of his deliberate and premeditated malice did kill and murder the said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Second Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Julius Fisher, on, to wit, the first day of March 1944, and at and within the District of Columbia aforesaid, contriving and intending to kill one Catherine Cooper Reardon, then and there being, feloniously, wilfully, purposely and of his deliberate and premeditated malice, with a certain stick of wood held in the hand or hands of him, the said Julius Fisher—but whether in one of his hands or in both his hands is to the Grand Jurors aforesaid unknown—did strike, beat and wound the said Catherine Cooper Reardon, in and upon the head of her, the said Catherine Cooper Reardon, and thereby did give to the said Catherine Cooper Reardon, in and upon the front of the head and in and upon the right side of the head of her, the said Catherine Cooper Reardon, two certain mortal wounds and fractures, of which said mortal wounds and fractures she, the said Catherine Cooper Reardon, on, to wit, the said first day of March, 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, in the manner and by the

means aforesaid, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did kill and murder the said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Julius Fisher, on, to wit, the first day of March 1944, and at and within the District of Columbia aforesaid, contriving and intending to kill one Catherine Cooper Reardon, then and there being feloniously, wilfully, purposely and of his deliberate and premeditated malice, with the hands and fists of him, the said Julius Fisher, did strike, beat and wound the said Catherine Cooper Reardon, in and upon the head of her, the said Catherine Cooper Reardon, and the said Julius Fisher did then and there feloniously, wilfully, purposely and of his deliberate and premeditated malice, knock the said Catherine Cooper Reardon against and upon a certain hard, sharp object, a more particular description of which is to the Grand Jurors aforesaid unknown, with great force and violence, thereby then and there giving to her, the said Catherine Cooper Reardon, as well by the said striking, beating and wounding of her, the said Catherine Cooper Reardon, as by the knocking of her, the said Catherine Cooper Reardon against and upon the said hard, sharp object, in and upon the front of the head and in and upon the right side of the head of her, the said Catherine Cooper Reardon, two certain mortal wounds and fractures, of which said mortal wounds and fractures she, the said Catherine Cooper Reardon, on, to wit, the said first day of March 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, in the manner and by the means aforesaid, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did kill and murder the

said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Fourth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Julius Fisher, on, to wit, the first day of March 1944, and at and within the District of Columbia aforesaid, unlawfully and feloniously did perpetrate a robbery, that is to say, unlawfully and feloniously, by force and violence and against resistance and by putting in fear, did steal, take and carry away, from and off the person and from the immediate, actual possession of one Catherine Cooper Reardon, then and there being, a certain finger ring, of the value of, to wit, ten dollars, of the property of the said Catherine Cooper Reardon; and that in perpetrating the robbery aforesaid, the said Julius Fisher, at the time and place aforesaid, unlawfully and feloniously did fix and fasten about the neck and throat of the said Catherine Cooper Reardon, his hand or hands—but whether it was one of his hands or both his hands is to the Grand Jurors aforesaid unknown—and with his hand or hands so fixed and fastened about the neck and throat of her, the said Catherine Cooper Reardon, as aforesaid, then and there unlawfully and feloniously, and in perpetrating the robbery aforesaid, did choke and strangle the said Catherine Cooper Reardon, of which said choking and strangling she, the said Catherine Cooper Reardon, on, to wit, the said first day of March 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, at the time and place aforesaid, and in the manner and by the means aforesaid, unlawfully and feloniously, and in and while perpetrating the robbery aforesaid, did kill and murder the said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Julius Fisher, on, to wit, the first day of March 1944, and at and within the District of Columbia aforesaid, unlawfully and feloniously did perpetrate a robbery, that is to say, unlawfully and feloniously, by force and violence and against resistance and by putting in fear, did steal, take and carry away, from and off the person and from the immediate, actual possession of one Catherine Cooper Reardon, then and there being, a certain finger ring, of the value of, to wit, ten dollars, of the property of the said Catherine Cooper Reardon; and that in perpetrating the robbery aforesaid, the said Julius Fisher, at the time and place aforesaid, unlawfully and feloniously, with a certain stick of wood held in the hand or hands of him, the said Julius Fisher—but whether in one of his hands or both of his hands is to the Grand Jurors aforesaid unknown—did strike, beat and wound the said Catherine Cooper Reardon, in and upon her head, and thereby did give to the said Catherine Cooper Reardon, in and upon the front of her head and in and upon the right side of her head, two certain mortal wounds, and fractures, of which said mortal wounds and fractures she, the said Catherine Cooper Reardon, on, to wit, the said first day of March, 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, at the time and place aforesaid, and in the manner and by the means aforesaid, unlawfully and feloniously and in perpetrating a robbery, did kill and murder the said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That one Julius Fisher, on, to wit, the first day of March, 1944, and at and within the District of Columbia aforesaid, un-

lawfully and feloniously did perpetrate a robbery, that is to say, unlawfully and feloniously, by force and violence and against resistance and by putting in fear, did steal, take and carry away, from and off the person and from the immediate, actual possession of one Catherine Cooper Reardon, then and there being, a certain finger ring, of the value of, to wit, ten dollars, of the property of the said Catherine Cooper Reardon; and that in perpetrating the robbery aforesaid, the said Julius Fisher, at the time and place aforesaid, with his hands and fists, unlawfully and feloniously did strike, beat and wound the said Catherine Cooper Reardon, in and upon her head, and did then and there unlawfully and feloniously knock the said Catherine Cooper Reardon against and upon a certain hard, sharp object, a more particular description of which is to the Grand Jurors aforesaid unknown, with great force and violence, and the said Julius Fisher, as well by the said striking, beating and wounding of the said Catherine Cooper Reardon, as by the knocking of her, the said Catherine Cooper Reardon against and upon the said hard, sharp object, at the time and place aforesaid, unlawfully and feloniously did give to the said Catherine Cooper Reardon, in and upon the front of her head and in and upon the right side of her head, two certain mortal wounds and fractures, of which said mortal wounds and fractures she, the said Catherine Cooper Reardon, on, to wit, the said first day of March 1944, and at and within the said District of Columbia, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Julius Fisher, at the time and place aforesaid, and in the manner and by the means aforesaid, unlawfully and feloniously and in perpetrating the robbery aforesaid, did kill and murder the said Catherine Cooper Reardon; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

(S) EDWARD M. CURRAN,
Attorney of the United States in and for the District of Columbia.

A true bill:

(S) EDGAR F. MCINTIRE,
Foreman.

FRIDAY, MARCH 17, 1944.

The Court resumes its session pursuant to adjournment: Mr. Justice McGuire, presiding.

No. 73393

UNITED STATES

vs.

JULIUS FISHER

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail; whereupon the defendant being arraigned upon the indictment, the said indictment having been read, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like.

Memorandum

JUNE 26, 1944.

Jury sworn and respited from day to day to and including June 29, 1944.

THURSDAY, JUNE 29, 1944.

The Court resumes its session pursuant to adjournment: Hon. James M. Proctor, presiding.

No. 73393

UNITED STATES

vs.

JULIUS FISHER

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath say that the defendant is guilty of the first count of the indictment and by direction of the Court not guilty on the second count of the indictment; and thereupon each and every member of the jury is asked if that is his verdict and each and every member thereof say that the defendant is guilty on count one of the indictment.

and not guilty on count two of the indictment; and thereupon the defendant is remanded to the Washington Asylum and Jail.

In the District Court of the United States for the District of Columbia

Holding a Criminal Court—Criminal No. 73,393

UNITED STATES v. JULIUS FISHER

Motion for new trial.

Defendant moves the Court to set aside the verdict rendered against him June 29, 1944, finding him guilty of murder in the first degree on Count I of the Indictment and to grant him a new trial for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the instructions of the Court.
3. The verdict is contrary to the evidence.
4. The verdict is contrary to the weight of the evidence.
5. The Court erred in admission of evidence; including, among other things:

   a. In admitting the alleged homicide weapon, a certain stick, Government exhibit No. 30.

   b. In admitting the alleged written confession of the defendant, Government exhibit No. 33.

   c. In receiving the alleged oral confession of the defendant when defendant had not been warned of his rights.

6. The Court erred in excluding evidence; excluding, among other things:

   a. Certain portions of the testimony of Dr. E. Y. Williams.

   b. The testimony of Canon Wedel.

7. The Court erred in refusing Instruction No. 6 offered by the defendant.
8. The Court erred in charging the jury, in spotlighting unfavorably the testimony of the defendant.
9. The Court erred in sending the jury back for further deliberation after the jury had reported its verdict on both Counts I and II.

10. For other errors which will be called to the attention of the Court on the argument of this Motion.

(S) CHARLES H. HOUSTON,
Charles H. Houston,
Attorney for defendant.

Service accepted and notice waived.

(S) EDWARD M. CURRAN,
United States Attorney.

FRIDAY, JULY 7, 1944.

The Court resumes its session pursuant to adjournment: Hon. James M. Proctor, presiding.

No. 73393

UNITED STATES

vs.

JULIUS FISHER

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney Charles H. Houston, Esquire; and thereupon the defendant's motion for a new trial, coming on to be heard, after argument by the counsel, is by the Court overruled, to which action of the Court, the defendant by his attorney, prays an exception which is noted; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the Court that the said defendant for his said offense, be taken forthwith to the Washington Asylum and Jail, otherwise known as the District Jail, in the District of Columbia from whence he came and there to be kept in close confinement; and that on the 24th day of November, A. D. 1944, he be taken to the place prepared for his execution within the walls of the said Washington Asylum and Jail and that then and there between the hours of Ten (10) o'clock ante meridian and Two (2) o'clock post meridian he be electrocuted by causing to pass through his body a current of electricity of sufficient intensity to cause his death and that the application of such current of electricity shall be con-

tinued until he is dead, and may God have mercy on his soul; it is further ordered that a certified copy of this sentence shall be transmitted by the Clerk of the District Court of the United States for the District of Columbia to the Superintendent of the aforesaid Washington Asylum and Jail not less than ten days prior to the time fixed in this sentence of the Court for the execution of the same.

In the District Court of the United States for the District of Columbia

Criminal No. 73393

UNITED STATES

v.

JULIUS FISHER

Proposed bill of exceptions submitted by defendant

This cause came on for trial in the April, 1944, Term of Court, beginning Monday, June 26, 1944, and ending on Thursday, June 29, 1944. The United States was represented by Edward M. Curran, United States Attorney, and Charles B. Murray, Assistant States Attorney, and the defendant was represented by Charles H. Houston, Esquire. The trial was had before Justice James M. Proctor, holding Criminal Division No. 4 of the District Court of the United States for the District of Columbia. (Transcript of Proceedings, p. 1; all page references hereafter are to the Transcript of Proceedings unless otherwise specifically noted.)

The case was identified to the prospective jurors and the Court conducted the questioning of the jurors on their voir dire, asking, among other things, all the questions which counsel for the government and for the defendant had submitted. The jury as finally sworn was satisfactory to both sides. (3–22)

After the jury was sworn, counsel for the government made an opening statement of what it expected to prove in support of the indictment. The indictment contained six counts: The first charging a deliberate murder by choking, the second count a deliberate murder by using a stick of wood, the third count deliberate murder by striking and pushing against a hard object, the fourth count murder by choking in the perpetration of robbery, that is the taking of a ring from the finger of the

deceased, the fifth count murder by the use of a stick of wood in perpetration of the said robbery, and the sixth count murder by striking and pushing against a hard object in the perpetration of said robbery.

In the opening statement for the government, the United States Attorney stated to the jury, among other things, that the government would prove that by the use of a stick of wood, by choking and by stabbing of the deceased in the throat with a knife the defendant had deliberately murder her. The United States Attorney further stated as follows:

> We will show you that the defendant then removed Miss Reardon's panties and attempted to wipe up the blood, and thereafter tried to wash them in the wash basin, and then threw them beside her body situated in a little crypt in the basement of this library.
>
> We will show you that the defendant then removed Miss Reardon's class ring of the College of William and Mary. We will show you that he dragged her body down that ladder, and that as he did so her shoes came off and that he picked them up and threw them beside the body.
>
> We will show you that * * * he threw his bloody clothes in the closet of his bedroom and placed Miss Reardon's class ring in his ring box in the drawer of his smoking-stand beside his bed (23–30).

At the conclusion of this opening statement, counsel for the defendant moved the Court to direct a verdict on Counts 4, 5 and 6 charging murder in the perpetration of a robbery. Thereupon the following occurred:

> The COURT. Do you think, gentlemen, that you are going to press the last three counts? In your final concluding statement you said you were going to ask for a verdict on the ground of deliberate murder.
>
> Mr. MURRAY. That will undoubtedly be our position. We would prefer, however—We don't know what turn the evidence will take. We would prefer the evidence to be in.
>
> Mr. HOUSTON. I have a right to insist upon it.
>
> The COURT. I don't know about that. I think the situation may be such as to definitely require an election by the government at the conclusion of its evidence.

Mr. MURRAY. Yes, it probably will. It would make no change in the evidence.

The COURT. * * * It wouldn't limit the evidence. I think I should overrule your motion with the right to renew it at the end of the government's case. It will be denied with the privilege to renew at the end of the government's case (30–31).

Thereupon, counsel for the defendant made a brief opening statement in which he stated, among other things, that if the government proves that the killing was the act of the defendant the defense would not contest it, but would contest that the killing was a matter of deliberate and premediated malice. Counsel further stated that the defense denied absolutely that there was any robbery whatsoever in the case. Thereupon, eighteen photographs, mostly of the interior of the library building in the Washington Cathedral grounds, were received in evidence and marked Exhibits 1 to 18 inclusive, having previously been examined and agreed upon by counsel (32–34).

Thereupon, the government called as a witness Miss Helen A. Young, who being first duly sworn, testified as follows: I am archivist at the Washington Cathedral and have been for three or four years and for a longer period have been employed at the Cathedral. I live at 3715 Woodley Road and I knew Catherine Cooper Reardon for about eight years (35). She lived in that same apartment building. I knew Julius Fisher from the the time he began to work at the Cathedral. On the morning of March 1, 1944, I went to the Cathedral with Miss Reardon, leaving our apartment building at about ten minutes before nine. We arrived on the grounds about five minutes later and parted there. I had to go in the Cathedral Office and she had to go to her office (36). On the morning of March 2, I went to the Catherdral and part of the way was accompanied by Miss Wormeley. We then knew that Catherine Cooper Reardon was missing. When we got to the Cathedral I got the keys to the library and entered it and went into the basement where the stacks are, then I went on to the main floor where the reading room is and then I went up into the attic. On a chair in the attic I found Miss Reardon's outer garments (38): The coat, scarf, gloves and hat now shown me are the articles which I saw. (Thereupon the ar-

ticles were received in evidence and marked as one exhibit, No. 19). Miss Reardon kept her clothes in the basement on a costumer just across from the desk where she worked. The class ring shown me looks like the ring Miss Reardon wore. (The ring was thereupon marked for identification Government Exhibit No. 20) (39). When I saw her outer garments in the attic, I brought them downstairs and put them on a chair by her desk (40).

There was no cross-examination of this witness.

Thereupon, the government called as a witness James P. Berkeley, who being first duly sworn testified as follows: I am verger at the Washington Cathedral and have been employed there for twenty years. I knew Miss Reardon and know the defendant Julius Fisher. I hired Fisher about a week before Christmas, 1943. His duties were to clean the Cathedral library, the Christmas card department and the office annex (42). His hours were from seven in the morning until three o'clock in the afternoon, except on Wednesdays when his hours were from seven o'clock in the morning until eleven o'clock in the morning. I had a conversation with Canon Wedel of the Cathedral and as a result of it I told Fisher that the space under the desk in the Cathedral library needed to be cleaned, and that there had been a complaint about it. Fisher did not appear for work on Thursday, March 2 (43).

Cross-examination:

The complaint about the part under the desk in the library came to me about a week before the murder (44). I did not receive any previous complaint about the rug in the library reading room (45). There was discussion between me and Canon Wedel about that rug. Fisher came under my observation about 10:30 every morning. There was nothing offensive or unusual about his manner of working. He was reasonably quiet. I caused an order to be issued to the effect that any complaints about cleaning should be brought to my attention and not to the cleaner's attention (46). In other words, Fisher was working in four different buildings and we did not wish everybody in all these buildings giving him orders. That was the reason for the order. I communicated to Fisher the report about the dirt under the desk, and I would like for him to take care of it. He took the complaint in the usual way that

any complaint would be received (48) and did not show a bit of offense. So far as I know he cleaned the library thereafter down to the day of Miss Reardon's death. I do not know whether Miss Reardon was in the library or on the premises between the day I told Fisher about the complaint and the day of the actual killing. This was the only complaint about Fisher's work (49).

Thereupon, the government called as a witness John H. Bayless, who being first duly sworn testified as follows: I am curator of the Washington Cathedral and have been for fourteen years. I learned that Miss Reardon was missing at eight o'clock Thursday morning, March 2, 1944 (50). Later that morning I entered the library building and went down the steps to the stack room in search of Miss Reardon. I went first to the library where her desk is. I saw her hat and coat there (51). (Identifies Government Exhibit 19). They were on a chair beside Miss Reardon's desk. I searched through the stacks for her and called out her name. I did not find her. I went upstairs and saw Miss Young and Miss Wormeley there. Then I went to the attic on the third floor (52) and found nothing, and came down again. Then I went down to the basement again and saw the toilet door open (53). I went into the lavatory there and saw within another door which I had not noticed before. It was closed. I opened it and found a light burning in the sub-basement. I went down the iron ladder to that sub-basement (54) and discovered a steam pump in operation there. As I turned to leave, I noticed a recess in the wall off to my right. I looked in that recess and discovered the body of Miss Reardon. It was about ten feet back lying across with her back to me (55). I notified Miss Young and Miss Wormeley and had them contact the police. When I left the library building I locked it. A uniformed officer arrived later and I took him to the sub-basement and showed him the body (56). (Thereupon, the witness was shown Government Exhibit 11, being a picture of the south end of the stack room showing windows and a table and a radiator and showing books on the radiator). I believe the heat was off at that time. These books were usually kept on the table and not the radiator (57).

No cross-examination.

Thereupon, the government called as a witness DANIEL O. FLETCHER, who being first duly sworn testified as follows: I am a police officer attached to No. 8 Precinct. I went to the Washington Cathedral on March 2, 1944, and saw there Mr. John Bayless who escorted me to the sub-basement of the library on the Cathedral grounds (58). There I observed the body of a woman in the steam pipe tunnel in the sub-basement. (Witness shown Government Exhibit 18, being a picture of the recess or tunnel in the sub-basement). That is where the body was found. I caused the Homicide Squad to be notified and was there when members of the squad arrived. The first to arrive were Detective Sergeant Scott and Detective Sergeant Murray. Others arrived after them (59). When I observed this body, I could see that there was evidence that it had been dragged in there. I did not go any closer than the entrance of the recess. The body was in a crumpled-up position, with her back to me.

No cross-examination (60).

Thereupon, the government called as a witness Edgar E. Scott, who being first duly sworn testified as follows: I am a detective sergeant of the Homicide Squad of the Metropolitan Police and have been for three years. I was in the homicide office on the morning of March 2, 1944, when I got a call to go to the Cathedral, and I went there in company with Sergeant Murray, arriving at 9:45 a. m. (61). I went into the Cathedral library building, being admitted by an officer who was at the door. I went down winding steps to the next landing where there were stacks of books, which I learned was the decedent's office. As I went down the steps I noticed a lavatory on the landing there and I noticed a wooden door at the top of the steel ladder, on which door I noticed a hand print apparently made with blood (62). (Witness shown Exhibit No. 14, the blood spots on the door to which he referred.) I went down the steel ladder and at the bottom of that there is a step a little deeper, then I turned to the left and stepped back up again into a steam pipe tunnel, where I could see the body of the deceased about seven and one-half feet back in this steam pipe tunnel (63). Sergeant Fletcher had shown me where to look.

The body was lying in a twisted position. The face was towards the rear of the tunnel and away from me as I looked in. She was lying on the right side of her face. Her clothing was up around her hips. She had on a pink dress pulled up around her hips, as though she had been dragged along and the dress pulled up at the time. There was blood on the dress. She had on mesh stockings. A pair of black Oxfords were lying near the body and not on her feet (65). It appeared that the body had been dragged along and dragged certain debris along with it, which was up around the body. Observed a bloody cloth. I did not know what it was at that time but learned later that it was a pair of women's panties. A smock which was crumpled up apparently had been used to wash up the floor. It was lying just beyond her head. The panties were lying near the body and nearer to the entrance as I looked in. It was dirty and bloody and crumpled up (66). The head of the body was very bloody (67).

The foregoing concluded the morning session of June 26, 1944. At this point the Court excused the jury, giving them instructions covering some four pages of the typewritten transcript as to their conduct during the trial, admonishing them to be careful to refrain from getting any information in the course of the case except as was revealed by the evidence in the case (68–71). At the beginning of the afternoon session the jury was taken in a body to the Cathedral to view the premises (72). This was in accordance with the motion of defense counsel before the trial concurred in by government counsel. The jury traveled in a body in a bus in which also were the attorney for the defendant and his secretary, the trial judge, government counsel, the clerk of the court and the court reporter. The defendant was taken separately in the custody of the marshals. At the Cathedral the jurors were taken to the library building and shown the reading room on the main floor, the stairway to the attic, the attic, the winding stairway to the basement, the basement, library or stacks, the lavatory, the iron ladder to the sub-basement and looked there into the crypt or tunnel where the evidence showed the body was found. Present also at the Cathedral by prearrangement were Edward S. Dawson, Inspector of Claims in the office of the Corporation Counsel for

the District of Columbia, and Emmett J. Motley, Assistant Inspector of Claims, Engineer and Draftsman, office of the Corporation Counsel for the District of Columbia. These men took measurements and thereafter with the specific consent of defense counsel in the presence of the defendant testified as to the measurements (73–76). A measurement was taken from the edge of the fireplace where it meets the floor on the north end of it, which is the end nearer the entrance to the room to the depression or keeper in the doorway, where the bolt of the door goes in. This measured 16 feet 4⅛ inches. From the said spot in the doorway to the farther edge of the step to the winding stairs measured 7 feet 9⅝ inches (78). From the farther edge of the first step down the center of the stairway, holding the tape taut and not conforming with each step but straight down the center and around the winding staircase, measured 24 feet 2 inches. From the center of the bottom of the last step in the basement, across the hall to the depression or keeper in the doorway leading to the basement library or stacks, measured 10 feet and ⅛ inch (79). From that spot in the doorway to the center of the desk in the library measured 7 feet 9 inches. (There was later testimony in the case that the desk on this day was in the same position as the day of the killing). From that same keeper in the doorway in the basement back to the back part of the library to a point about 2 feet, before reaching the radiator at the back end, measured 37 feet 6 inches. The winding steps leading from the basement where the library or stacks were to the main floor where the main room where the reading room and fireplace were, were counted and were 21 in number. In addition to these measurements, a measurement was made from the keeper or depression in the doorway in the basement through the center of two or three steps down to the bathroom and (80) stopping on the sill of the doorway of the bathroom and that measured 12 feet 6 inches.

Thereupon John H. Bayless further testified in the presence of the jury to the effect that the desk in the basement library was on this date of June 26, 1944, in the same position as it was the day of the killing (81). Thereupon, certain blueprints were identified by Mr. Bayless and received in evidence, being marked Government Exhibit No. 21 (82).

Thereupon Helen A. Young further testified at the Cathedral as to the position of the chair in the attic on which she found Miss Reardon's clothing (84).

All the proceedings at the library as hereinbefore described were had in the presence of the defendant and his attorney. All the proceedings except the actual taking of the measurements were had in the presence also of the Court and the jury. The Court and the jury remained in the reading room of the main floor while most of the measurements were made. The defendant and his attorney and government counsel accompanied Mr. Dawson and Mr. Motley when they made the first measurements. Thereafter Mr. Dawson and Mr. Motley testified as to the measurements under oath in the presence of the trial judge and jury.

Whereupon, the Court, jury, prisoner, counsel and reporter returned as they had come to the courtroom and sessions were resumed there (86).

The direct examination of Detective Sergeant EDGAR E. SCOTT was resumed as follows: The smock near the head of this woman's body appeared to have been used to clean the floor with. All of this clothing was taken to the Morgue as far as I know (87). I saw a blood spot on the floor outside the office door, and the floor of the office had the effect of being washing up and dried out again. I did not see blood spots in the library itself. I noticed blood stains on the wash bowl in the bathroom (88). From the Cathedral I went to 4806 Hayes Street, N. E., the home of Julius Fisher. I had not seen Fisher at the Cathedral that morning. We got to his home a little before eleven and I saw there Mrs. Susan Washington (89). I obtained from that house a pair of trousers, a shirt and sweater, which were in the closet in the room we were told was Fisher's on the second floor front. I went there to make a search for Fisher. As I looked through the bedroom I observed this closet. I looked in there for Fisher. I pulled back the clothing that was hanging there to see if there was any one behind there. I noticed a roll of clothing on the floor with blood stains on it. As I took the clothing out, I noticed that there was a quantity of blood on them, and that the knife was rolled up inside the clothing. I put my mark on the clothing

and the knife (90). (Thereupon the witness identified the trousers, Government Exhibit No. 22, the striped shirt, Government Exhibit No. 23, the tan colored sweater, Government Exhibit No. 24, and the pen knife, Government Exhibit No. 25, as the articles mentioned). When I (91–92) first saw the knife the blades were closed. I took that clothing and knife with me to the Homicide Squad that day, and they remained in my possession until I took them to the Coroner (93). Sergeant Felber and I thereupon made an investigation to try to locate Julius Fisher. We went to a place where he formerly worked, the Capital Chemical Company on 30th Street. We eventually found Fisher at Perry's Grill at 18th and U Streets, I believe it is 1806. Sergeant Felber was with me when we found him. I went in first and then went back to the car and then Felber and I went in together. I saw Fisher seated at a table half way back with two other men (94). His back was towards the front of the restaurant and the other two were sitting opposite him in the same booth (95). I saw certain clothing hanging on a hook beside him and also had a description of him and had seen a photograph. I asked him if he was Fisher and he said "Yes". I told him we would have to take him to headquarters. He asked what it was all about and I said we wanted to talk to him about a certain felony case we were investigating, and we would explain it all as soon as we got down there. We went out to the car and sat him in the back of a headquarters cruiser on the left rear of the seat and I was sitting on the right. Sergeant Felber got under the wheel directly in front of him. As he started to drive away towards headquarters, he had moved a short distance when I noticed the defendant had his hat down in his right hand like this (witness puts his hand on his chest), and his left hand was coming out of this coat pocket (witness illustrates right inside coat pocket). I couldn't see for sure just what he had, so I made a grab for him, and as my hand contacted him, my right hand struck on a Savage automatic pistol. I said to him, "You're fixing to shoot a couple of policemen." He said, "No, I was going to shoot myself." I said, "What are you going to do that for?" (97). (Thereupon the Savage automatic pistol, marked Government Exhibit No. 26, was received in evidence). This pistol had seven shells in the clip. I took

possession of the gun at that time (97). It was 8:00 o'clock p. m. on March 2, 1944, when we entered this restaurant. We got to police headquarters about 8:30. Fished was booked, that is his name and address and other information are taken down on a blotter in the Detective Bureau office. He was not charged right then. He was taken over to the Homicide Squad office and got over there about 8:45 p. m. Sergeant Felber and I questioned him at that time (98) and he answered our questions. I believe Lieutenant Flaherty was present at that time. The questioning lasted ten or fifteen minutes. Then Fisher was taken to where the typewriter was in the Homicide Squad office and a written statement was taken from him. Present at that statement were Sergeant Felber and myself, Vogelsang, a clerk officer, and Lieutenant Flaherty. Mr. Berkeley came in during that statement (99). (Thereupon the panties, the smock, the dress, the slip and the stockings were received in evidence marked together as Government Exhibit 27) (100-101). After the defendant was questioned between 8:45 and 9:00 and before the written statement was taken, he was requested to turn over to the police, and did turn over to them the shoes he was wearing and his underwear, consisting of a shirt and shorts. (The shoes, shirt and shorts were thereupon received in evidence as Government Exhibit 28). Thereupon, the direct examination was concluded with the understanding that this witness could be recalled to testify regarding certain statements oral and written (102).

CROSS-EXAMINATION

Fisher's home showed refinement, was clean and the lady there was very nice and dignified. When we entered the grill at eight o'clock that night of March 2, Fisher had a small glass of whisky in front of him and a sandwich. As I started to talk to him he drank the whisky and as we started to walk away he said he wanted the sandwich and the man wrapped it up for him and he took it. I asked him about his drinking and he said that he had been some place with some girl and had something to drink that day but not much. He did not care to tell me the name of the girl (103). My recollection

is that the day he was talking about was that day and not the day before. That is all the inquiry I made of him about drinking. After Fisher was booked he was not questioned as to the crime until he was in the Homicide Squad office. When we got to the office of the Homicide Squad, it was I would say about ten minutes at the most before he admitted some connection with the killing. I would say it was between five and ten minutes (104). My investigation did not eliminate nor show any sex angle. (At this point government counsel stated in open court that the evidence would show that there was no such thing) (105).

Thereupon, the government called as a witness Richard J. Felber, who being first duly sworn testified as follows: I am a detective connected with the Homicide Squad and have been for three years. I went to the Cathedral with Inspector Barrett and Special Investigator Ennis. I was there for about five minutes and from there went to 4806 Hayes Street, N. E. (106), being admitted there by Mrs. Susan Washington. We took away with us a pair of trousers, a striped shirt, a yellowish pull-over sweater, and a small two-bladed pen knife. (These were admitted by counsel to be the ones about which Sergeant Scott had testified.) We then returned to the Homicide Squad and from there conducted a search of various places and at eight o'clock located the defendant at Perry's Grill at 2004 Eighteenth Street, N. W. which is near Eighteenth and Florida Avenue (107). We had left headquarters at five o'clock so that our search took about three hours. We took Fisher to headquarters in squad car and Sergeant Scott rode in the rear seat with him. We had just left the vicinity of the grill when I heard some conversation on the part of Scott with respect to a pistol and that "you are trying to shoot us." I stopped the car and turned around and Scott was then taking a gun away from Fisher. Scott got the gun and I continued on until we got to Police Headquarters (108). Fisher was sitting directly behind me; Scott was to my right and to the right of Fisher. I heard Fisher remark when Scott said about him trying to shoot us, "I wasn't going to shoot you. I was going to shoot myself." The first mention made to Fisher

about the killing of Miss Reardon was at about 8:45 p. m., at the Homicide Squad office. Fisher was questioned at that time for about fifteen minutes. After that he made a signed statement (109) which the stenographer took down in typewritten form. Between these two statements, he was asked what he wore on Wednesday, March 1, 1944. He stated he wore a pair of gray tweed trousers and a white and green striped shirt and a yellowish pull-over sweater at that time. Scott got the clothing from a drawer in his desk, laid them on the desk beside where the defendant was seated. Defendant said, "Those are the clothes there." At that time Scott opened them up and asked him how the blood got on there. He said, "I had some trouble with a lady out at the Cathedral." He pointed down to his shoes. He said, "I had these tan shoes on and also the same underwear that I have on now." He turned them over to us and they were taken and identified, marked for identification (110). The pen knife was first seen by me when Sergeant Scott pulled the clothing out from the floor of the closet in the defendant's room. The knife shown me, Government Exhibit 25, is that knife. (At this point the direct examination was concluded with the understanding that Sergeant Felber would be recalled to testify in reference to certain statements.)

CROSS-EXAMINATION

The appearance of Fisher's home was decent. We were looking for him for three hours (111), but after we left Hayes Street we didn't have to look for him twice at Perry's Grill. He was seated at a table there about two-thirds back on the left side, and had before him a sandwich and a drink of whisky. He drank the whisky before leaving. I don't recall any inquiry being made of him about his drinking that day, but he did mention that he had been drinking some beer. It was about 45 minutes after he drank this drink of whisky that his verbal statement was made and he made a signed statement approximately one hour later. He was not examined by a physician that night to determine his condition (112). By the Court: He appeared to be sober. He had been drinking and you could

smell the odor of his having been drinking. He talked coherently and walked as though in good condition (113).

Thereupon Henry C. Freimuth was called as a witness and being first duly sworn testified as follows: I am Special Agent for the Federal Bureau of Investigation and a chemist assigned to the laboratory in Washington. I am an expert in the examination of substances to determine whether they are human blood and have testified as such in court approximately sixty times. (His (117) qualifications were admitted). On March 4, 1944, an employee of the District Morgue turned over to me for examination the following articles: Government Exhibit 22, a pair of grey trousers; Government Exhibit 23, a shirt; Government Exhibit 24, a tan sweater; Government Exhibit 29, a pair of shorts. To these articles I applied a test from which it can be determined whether the substance on them is blood and whether it is human blood (118). From such test I determined that all these articles contained human blood. In addition to these articles there were also turned over to me a pair of shoes and an underwear shirt. There was no blood on either of these articles (119). On the 10th of March all of these articles were returned to the employee of the Morgue, Mr. Maxwell.

Thereupon Richard M. Rosenberg was called as a witness, who being first duly sworn testified as follows: I am Deputy Coroner for the District of Columbia (120) and have been for ten years. At twelve o'clock noon on Thursday, March 2, 1944, I went to the Washington Cathedral and into the library, in a room below the level of the ground (121). I made a general examination of the surroundings and noted numerous blood spots. These spots had the appearance of blood, and that appearance was confirmed by chemical analysis or tests which indicated that they were blood spots. There were spots on the east wall on the books and shelves and on the books and table (122). There were areas where there had been an effort made to clean the spots. There were several of these along this corridor. (The witness was pointing at Exhibit No. 9 the floor of the library in the basement). All of these showed the presence of blood. In the front of the book stack on the floor there were two small pieces of wood on which there were blood

spots. Next day I went to the Cathedral again in company with Detective Sergeant Ennis. It was in the middle of the day. This time I went to the main library on the street or ground level as pictured on Exhibit 3 now shown me (123). Detective Sergeant Ennis and I moved everything from the fireplace and also all the wood from a stack that was beside the fireplace. Pieces of wood were found in both piles which matched each other and into which fitted the small pieces that had been recovered downstairs. There were blood spots on some of them. (At this point the witness was shown for purposes of identification only Government Exhibit No. 30, being a piece of wood made up of pieces tied up with a piece of string). That is the piece of wood that was assembled by Detective Sergeant Ennis in the library there in my presence. The spots on that wood are blood (124).

CROSS-EXAMINATION

Then the fire was laid in the fireplace but not lit. It was a wood fire. There were some papers there which apparently had been placed beneath some wood; also some trash. There was kindling on the hearth by the fireplace and kindling on the fireplace. The wood on the hearth as shown by the pictures of the fireplace, Government Exhibit 3, was similar in appearance to the wood as I saw it there March 3, when I went there with Mr. Ennis (125). The wood on the hearth was of a different size and seemed to have been chopped with an axe and broken. Some of the ends were irregular and some not. Some appeared to have been sawed and others appeared to have been broken. There was not very much wood in the fireplace There were just a few pieces and they were not very large. I don't remember whether the ends were chopped or regular. When we took the wood out of the fireplace we first put it right on the hearth in front of the fireplace (126). The pile that was beside the fireplace was also spread out so that each piece could be seen separately. We picked up each piece and looked at it and an effort was made to match each piece with another. I do not know how many pieces this wood contained. I was there for perhaps an hour or so, and a great deal of that had been assembled by the Sergeant in my presence and with

my assistance. Then there came a time when I had to leave, so I was not here when the thing was completely assembled. The finished product is the work of Detective Sergeant Ennis (127). Some of the pieces which make up this stick do not have blood. (At this point a discussion ensued as to whether the piece of wood should be taken apart before the witness Ennis was called (128).) After the discussion witness Rosenberg was excused to be recalled (129).

Thereupon Christopher Joseph Murphy was called as a witness and being first duly sworn testified as follows: I am and have been for thirteen years a Deputy Coroner for the District of Columbia. I went to the Washington Cathedral on the 2nd day of March 1944, and pronounced the decedent dead at 10:45 a. m. She was in the sub-basement, back in an alcove where I had to go down an iron ladder to get to it. (Witness identified Government Exhibit 17, a picture showing the body) (13). Photographs were taken and then I ordered the body removed to the District Morgue. At two o'clock the afternoon of the same day, March 2, I performed an autopsy on this same decedent at the District Morgue. (It was stipulated that the body on which this autopsy was performed was that of Catherine Cooper Reardon, mentioned in the indictment.) The decedent was a white girl, about thirty-seven years of age (131). She weighed 111 pounds and measured five feet three inches in height. She was clothed in a pink dress, a pink slip and a pink brassiere. The clothing was removed and the examination proved the following: There was a mark on the right side of the neck with small marks on the left side of the neck, giving appearance on examination of left hand construction, the thumb being in the middle on the right side. There was a discoloration and contusion about the right eye. A contusion over the crest of the left ear. There was an extensive laceration, four inches long, on the right side of the head, running along the long axis of the skull; gaping two and one-half inches, with a very extensive fracture of the skull under this laceration. There was another laceration over the top of the skull just to the right of the midline, three inches long, gaping one and one-half inches, with the skull crushed under this laceration, the crushing fracturing the skull under this laceration ex-

tending down on to the opposite side of the skull (132). The skull gave the appearance of an egg shell crushed all over from the two extensive lacerations as described by me. All the sutures—which are the articulation or meshing of the bones of the skull—were widely separated with blood oozing through from the increased pressure from brain destruction within the skull. There were brush burns on both arms and hands, and scratches of dug out character on the back part or dorsal surface of both hands. There were brush burns on the ankles, the thighs and the buttocks. There were seven marks on the abdomen, which had the appearance of burninig from constriction, like something tight being pulled and causing a friction as of a belt. On opening the head and skull, I found these fractures as described with brain destruction and a large amount of hemorrhage within the cranial cavity. On opening the neck, the reflection of the muscles from the larynx, I found a large amount of hemorrhage both anteriorly and posteriorly, with a fracture of the hyoid bone on the left side, which can only be caused by manual pressure exerted from without, causing a fracture of the larynx from pressure (133). On examination of the genital organis there was no evidence of contusion, abrasion, or trauma, and the decedent's hymen ring was intact. In other words, this decedent had not been criminally assaulted or attempted to be entered. The cause of death in this case was multiple fractures of the skull with intercranial hemorrhage and asphyxia due to strangulation. (Thereupon, the witness at the request of the District Attorney demonstrated the position on the neck of the thumb and fingerprints). That is what I mean by left hand construction. There was a very small stab wound on the (134) left side of the neck, which did not penetrate the neck to any depth, but did peel the skin in that region but did not enter the muscles. On March 3, 1944, I examined this ring now shown me, Government Exhibit 20, described as a garnet ring, marked "College of William and Mary," yellow gold with the date of 1928 on the ring. This ring was positive on the inner side for reaction of blood. (At this point counsel for the defendant announced a stipulation that Catherine Cooper Reardon, the decedent mentioned in the indictment, was graduated

from the College of William and Mary in 1928 (135). Government Exhibit 20 was thereupon received in evidence).

CROSS-EXAMINATION

The knife wound was not deep but just went through the skin. The brush burns could have been caused by dragging (136). Friction by dragging flesh over a concrete floor would have produced them. My deduction was that the marks on the abdomen were caused by friction of the belt rubbing as the body was dragged.

REDIRECT EXAMINATION

The body of the deceased was clothed in stockings, pink slip, pink dress, and pink brassiere and they were all saturated with blood. The panties had been used for a scrub rag. There was blood on all the clothing (137).

(In answer to questions by the Court:) Either head wound could have been fatal. There is no doubt that the choking would have been fatal. There is no doubt that the fractured skull, both the fractures or either one, would be fatal.

Whereupon David S. Ennis was called as a witness, and after having been first duly sworn, testified as follows: I am Special Investigator for the Homicide Squad of the Metropolitan Police (138). On March 3, 1944, I pieced together the club that appears before me on the desk (Government Exhibit 30). Shortly before midnight of March 2, 1944, during the taking of a statement by the defendant at the homicide office, Fisher stated he had used a piece of wood in the assault on Miss Reardon. I went to the Cathedral at midnight that night and went into the reading room. There in the fireplace I found four large pieces of wood with what appeared to be blood stains. (Witness identified the fireplace shown in that picture, Government Exhibit 3) (139). These pieces of wood were under four large pieces of cord wood in the fireplace proper. When I got there the screen was in front of the fireplace and I removed it. These four pieces which I now have picked out are the four which I found on that occasion. They are the only ones I took from the fireplace that night (140). After I took them out of the fireplace I restored the other wood

and put the screen in its original position. I had been in that room earlier on March 2. All during the day and whenever I saw that fireplace, the screen was in front of it. I wrapped these four pieces of wood up and took them to the Homicide Squad. I showed them to Lieutenant Flaherty. We attempted to put them together that night but something was missing (141). Dr. Rosenberg was at the Homicide Squad at that time. We tried to put them together but could not. We made arrangements to go back to the library next day. Next day we did go to the Cathedral library and again removed the screen from the fireplace and took everything out of the fireplace including the kindling. In among the kindling wood was where we found these other four small pieces. We then sat down at a reading table in the room there and put them together securing them with white cotton thread. I made up the composite stick. (Thereupon the witness was asked if he thought he could do it again, and he said he thought it would take a little time. Government counsel stated they were willing to have him attempt it (142), and the Court said he could do so and suggested that it be done at the trial table where the jury could see him. Thereupon the witness, in view of the jury, reassembled the club and returned to the witness stand). That is the way I put them together. (Thereupon the club was offered in evidence. Defense counsel stated he wished to question the witness further) (143).

CROSS-EXAMINATION

It was in the wood behind the screen that I found the four pieces I first saw.

Q. Was it in the wood behind the screen in the fireplace itself that you found the little pieces also that you have just pieced together here?

A. The four remaining pieces; there were one or two of the splinters which were found in the sub-basement library there.

We took down the pile of kindling or firewood that was beside the screen on the hearth and put it back in the form in which it is shown in the picture. The wood outside the screen was

kept separate from that inside it (144). We found no pieces of wood outside the screen that went to make up the stick. With the exception of one or two splinters found in where the book shelves are all the pieces were found in the fireplace. Dr. Rosenberg did the testing of these pieces for blood but not in my presence. I am going by what appeared to me and by what Dr. Rosenberg said at that time as to blood. I do not know it to be a fact that the wood was in the same condition and had not been disturbed between the time of the killing and the time I picked the pieces out (145). (Thereupon counsel for the defendant objected to the introduction of the stick of wood. The Court questioned the witness who in answer testified as follows:) I first got to the library about 9:30 a. m., March 2, 1944. Detective Sergeants Robert Murray and Scott as well as some precinct officers were there. I noticed the fireplace at that time and its appearance generally was just as it is in the photograph, in perfect order. I did not at that time look back of the screen any more than to notice that there was paper and wood stacked up as is normally the case. There had been no fire in the fireplace from the time the wood was placed there until we took it out (146). On this first visit of mine I also observed the wood at the side of the fireplace. When I went back I went through those stacks of wood and they appeared then to be in the same condition as when I first had seen them and the place was in order. From the morning of March 2 until I made this final examination of the fireplace on March 3 the library building was locked, and there were uniformed police officers stationed there at all times. (Thereupon Mr. Houston asked the following question: "So far as you know, however, no examination was made of the fireplace until you made your first examination at about midnight on March 2, is that right?" "A. To the best of my knowledge, that is correct") (147). I do not know when the fire was laid in the fireplace.

Thereupon Richard M. Rosenberg was recalled and testified further as follows: I did not test for blood the pieces of wood that made up this club. The stains were characteristic (148) and I expressed the opinion that they were blood. No other sticks found at the fireplace were likewise stained to my knowl-

edge. This portion of the stick shown me is blood-stained; that too has a blood-stain; so does that, and that, and that, and that; they all have.

CROSS-EXAMINATION

Two small pieces I saw in the floor between the rear bookcase and the wall. Detective Sergeant Ennis had three possibly four pieces at Police Headquarters the night of the occurrence. I did not make a note (149) but to the best of my recollection I expressed an opinion that one surely, and perhaps another of those pieces, had blood on it. The others I wasn't sure about. The two pieces I found in the basement stacks I laid aside there on a radiator or on a piece of furniture. I cannot identify them from these pieces shown to me because I made no mark on them (150), but one of them would be the size of this piece in my hand and the other the size of this other piece in my hand. I cannot swear that these are the identical pieces I found. I made no attempt to trace where the wood originally came from. Animal blood under chemical test shows up the same as human blood. It does not show up the same by a microscopic test. As far as my examination of these pieces of wood went, all I can testify is that it was blood. I can not testify whether it is human blood or animal blood. (In answer to a question of the Court): The blood stains appeared to be rather recent. I could not put a time on it with any accuracy (152).

Thereupon at the request of defense counsel Dr. Murphy, Deputy Coroner, resumed the stand for further cross-examination and testified that he could not determine from his examination in what order the crushing of the skull and the strangulation occurred; whether the crushing came before the strangulation or the strangulation before the crushing (153).

(At this point counsel for both sides went to the bench and government counsel informed the Court, out of the hearing of the jury, that the point had been reached in the government's case where testimony would be offered regarding verbal and written statements of the defendant. After discussion, it was agreed that the chief government witness as to the con-

fessions would be examined preliminarily out of the hearing of the jury) (154–155).

Whereupon the jurors were excused (156) and Detective Sergeant EDGAR E. SCOTT resumed the stand and on direct examination testified as follows: Fisher was booked at headquarters at about 8:30 p. m. About a quarter to nine he was questioned and gave answers which were not reduced to writing. (At this point Mr. Berkeley, a government witness who was to be questioned in connection with the written confession, was excused from the courtroom) (157). The booking took some ten minutes and Fisher was taken to a seat where he remained a minute or so before the officers began to question him, and nothing of importance occurred between the booking and the questioning. Sergeant Felber and I questioned Fisher; I believe Lt. Flaherty was there part of the time. Except for the grabbing of the gun from Fisher (158) and the holding of him for purposes of securing custody, no violence was offered him at all. He was not struck by anybody nor threatened with harm. There was no questioning about the crime on the way from Perry's Grill to Police Headquarters. Fisher was sober. I did not smell alcohol on his breath. I did see him take a drink of whiskey from a small whisky glass. He said he had had a drink in the afternoon with some girl (159) but did not say how much. He took with him the sandwich he had had at Perry's Grill, but he did not eat it at headquarters but kept it until he was taken to No. 1 Precinct, which was 12:15 a. m., March 3, 1944. He spoke coherently. He did not stutter or fumble in his speech. His walk was steady. He gave no other indication of drunkenness or other abnormal condition. He did not complain about not having food, drink or other comforts (160). I do not recall that he asked to go to the toilet. The questioning, which was not written up, took about fifteen minutes. Taking of the written statement immediately followed that. At the taking of the written statement Sergeant Felber questioned Fisher. Lieutenant Flaherty was there, Vogelsang, the typist was there, I was there and Mr. Berkeley came in and was there part of the time. After Mr. Berkeley left he was called back again for identification purposes. While Mr. Berkeley was there the first time, Fisher

could not see him (161), and Berkeley did not speak or otherwise make his presence known. The taking of the written statement took from 9:02 to 10:27. The concluding time 10:27 was put on the statement just before Fisher signed it, after it was read to him. There was no interruption from the beginning to the end of the statement. Fisher did not appear to be tired out or otherwise affected by the questioning or the taking of the statement. He did not say he was tired or make other complaint (162). He did not ask for anything. I do not recall seeing him smoke while he was in our custody. After we took him from headquarters to his home that night and were taking him from his home to No. 1 Precinct, where he was kept overnight, he asked on the way to No. 1 for cigarettes and Sergeant Crook bought him cigarettes at Ninth and H Streets N. E. (163). After the written statement was finished and Fisher had signed it, he was shown a piece of wood, as I recall, by Flaherty. The piece looked like one of the pieces before me. (Government Exhibit 30.) Fisher said that the piece of wood shown him was the piece of wood that he used; that it had broken and that was a piece of the stick he had used when he struck the deceased. When he first left headquarters that night, he was taken to his home (164) for the purpose of recovering the ring which Fisher said he had taken from the finger of the deceased, and which he said he would give us if taken to his house. We obtained the ring at that time from his home. It was from Fisher that we first heard anything about a ring.

CROSS-EXAMINATION

When Fisher was brought into the Homicide Squad from being booked, Sergeant Felber and I were with him (165). He was asked to have a seat right away. Nobody touched him before he sat down. Nobody struck him in the mouth or kicked him in the side before questioning began or just when it was begun. I am positive of that. The written statement was taken down on the typewriter as Fisher spoke. Officer Vogelsang is the regular police reporter; that is a stenographer assigned to that squad and does the stenographic work for the squad. He is a fair typist. He can typewrite approximately

as fast as an ordinary man can talk (166). If a sentence were spoken he could write it with a slight pause. He is fair on that. He is a very good typist. There was absolutely no violence exhibited toward Fisher at any time, from the time he was brought to the Homicide Squad by the officers until the confession was signed. No promise was held out to him. The first thing I asked him when he was brought into the office of the Homicide Squad was where he was employed and he said he was employed at the Washington Cathedral. The next thing I asked him was whether he was at work on Thursday and he said "No" (167). I asked him why he didn't work on Thursday, and he said he didn't feel good that day, that day being the same day we were questioning him, that day being Thursday. I asked him if he worked the day before, which was Wednesday, March 4, and he said he did. I asked him what hours and he said "7:00 a. m. to 11 a. m." I asked him how he was dressed on that day, and he said he had on grey trousers, a yellowish pull-over sweater, a green and white striped shirt. I asked him where those clothes were now and he said they were at home in his closet. Then I brought these clothes and laid them on the desk and without opening them up asked him if they were his and he said, "Yes, those are the clothes I wore on the 1st." I then asked him if he could account for the blood that was on the clothes. He said "yes", that he had some trouble with the lady out at the Cathedral. I asked him then, before the clothing was unfolded, what part of it had blood on. He said there was blood on the front of the trousers and sleeves of the sweater and shirt (168). I asked him if he knew the lady's name, and he said "no" but she was the lady that worked in the library. I asked him then to tell me about the trouble he had and he told me about the killing. I think I asked him all those questions myself. I do not recall any one else asking anything up until that time. They could have. I have related all the questions that were asked Fisher up to that point to the best of my recollection. The written statement was mostly the same as the verbal one, although it varied in some respects (169). From the time of Fisher's arrest until the end of the conversation I have just related, he was not out of my presence nor hearing. Up to

that time nobody had told him that he could stand on his constitutional right, and that any statement that he made, would be used against him. (At this point the defense counsel said: "That is all." Defense counsel then objected to the introduction of the evidence which objection was overruled and an exception noted) (170).

The jury was then brought back into the courtroom and the following proceedings occurred in their presence (171):

Detective Sergeant Scott remained on the stand and the following examination was a continuation of his direct examination, this time before the jury. He testified as follows: That I began questioning Fisher at headquarters at 8:45 p. m., March 2, 1944. Present were Sergeant Feiber and I and, I believe, Lieutenant Flaherty was there part of the time. I asked Fisher where he was employed and he said that he worked at the Washington Cathedral (172). I asked him what his duties were there and he said that he cleaned the card room office, curator's office and the Cathedral library building. I asked him if he worked on Thursday, March 2, and he said he did not. I asked him why and he said he didn't feel good. He said he worked March 1, from 7:00 a. m. to 11:00 a. m. I asked him what clothing he wore that day and he said that he wore a gray pair of trousers, a green and white striped shirt and a yellowish pullover sweater. I asked him where those clothes were now at this time that I was talking to him, and he said that they were in his bedroom closet at home. At this point I got the clothing out and laid them before him on the desk. I had gotten the clothing during the day when I was at his home and brought them to the Homicide Squad office at about 3:00 p. m. When I put this clothing before Fisher it had not been unfolded. I asked him if that was the clothing he had worn. He said, "Yes". I asked him how he accounted for the blood on these clothes and he said that he had some trouble with the lady at the Cathedral library (173). I asked him what part of the clothing he got blood on. He said on the front part of the trousers and on the sleeves of the sweater and shirt. I then asked him to tell me about the trouble. I asked him if he knew the lady's name he had the trouble with. He said "No", he didn't know her name but she worked in the Cathedral library. I asked

him to tell me about the trouble. At that time he said that he went to work and was already at work in the library building and in the lady's office when she came in at 9:00 a. m. or shortly afterwards. He said that Mr. Berkeley had told him on Monday that she had complained and then when she came in he asked her about it. He said that she said, "Well, if you would clean up right, I wouldn't have to do that." He said that he then stated to her, "Well, I don't see how you could do that because I try to do my work right." And she said, "Well, you can see under my desk now, the dust that you don't clean up under my desk." He stated to me at that time he smacked her and she started screaming and ran toward the far end of the office room, down near the window at the far end, screaming. He said at that time he went to the floor above, which was the main floor, and got the piece of wood off the fireplace and came back down to where she was and that he struck her twice with the wood (174), and he said then she started squawking and he strangled her and she fainted, and he dragged the body part of the way and carried it part of the way down to where he put it in the steam pipe tunnel. He said that after he did that he went back and took her pants off and went back along and cleaned up the blood with these pants and put them down by the body and that he picked up her shoes which had come off and put them down by her body. At that time he paused, and, as I recall, I asked him another question. He said he washed the pants out in the lavatory before he put them down there, and that he used them to clean up the floor where the blood had dripped on the way down. He said the shoes had fallen off on the way down and that he picked them up and took them down and put them by the body. At this point I asked him if he took anything else off the lady (175) and he said, yes, he took a ring off her finger. I asked him what he did with that ring, and he said that he took it home and put it in a ring box in the smoking stand by his bed. I asked him if we could have this ring, if he would rather us to get it, and if he would go with us and get it. He said he would rather go with us and that he would give it to us. I asked him what he did with the wood and he said that he took it back and put it in the fireplace on the main floor. I asked him if he had a key

to the building, and he said he did and he took the key out of his pocket and gave it to us, I believe to Sergeant Felber (176). The key now shown me, Government Exhibit 31, is the key he gave us which he said was to the Cathedral library building. (This was offered and received in evidence). He said that when he went upstairs and got the piece of wood, he took it from the wood pile by the fireplace and that after he struck her with it, it broke and he put it all back upstairs, but put it behind the wood on the fireplace. In this conversation I showed him Government Exhibit 25, the pocket knife. He said it was his. I asked him how the blood got on it (177). He said, "That is one thing I forgot to tell you about." He said, "The last thing I did before I left her, I stuck her in the neck with that knife." I asked, "Why did you do that?" He said, "I wanted to be sure she was dead." He said he left that knife with the clothing in the closet. He said he left work on the day of the killing at 11:00 a. m. This concluded the questioning at this time and he then turned his shoes and underwear over to us. I do not recall whether we had other underwear for him. I do not believe we did (178). When we had been to his house earlier that day, we had gotten a pair of his shoes from the closet. I had thought that possibly they were the ones he wore along with the other clothes. After he told us that the shoes he then had on were the ones he wore on Wednesday, we took those shoes from him and I gave him his other shoes which I had brought from his house that day. He put on all his other clothing, except, as I recall it, he had no other underwear (179). When we first arrested Fisher he drank down a little glass of whisky that was sitting before him at the table in the restaurant. It was a small whisky glass. He did not appear to be drunk at that time nor at any time that night. He did not stagger in his walk but was steady. His speech was normal so far as I could tell. He was coherent. You could understand him plainly. He answered questions intelligently. We did not have to repeat questions frequently to him. He stated that he had had just three years in school (180). He did not appear to be nor complain about being ill. The day he said he did not work because he didn't feel good was that same day of Thursday, March 2, 1944. That is the only statement he made about how

he felt that day. During the course of that evening, no violence was done to Fisher other than what was necessary to get the gun away from him. He was not struck or kicked by anybody, and nobody threatened to strike, kick or do any other violence to him. Nobody offered him any benefit, or give him any promise, if he would make a statement about the killing to the officers (181). After the conversation that I have just related was finished, Fisher was taken to the office where the typewriter was kept and where the clerk does the typing. He was asked to sit down in the chair by the typewriter, facing the clerk, and was asked to make a statement. The picture now shown me, Government Exhibit 32, represents the office of the Homicide Squad where this written statement was made (182). At the beginning of the taking of this statement Sergeant Felber, Lieutenant Flaherty, Officer Vogelsang and I were present. After it started, Mr. Berkeley came in and was there for five or ten minutes and went out again. When he left the statement was still being taken. Later he was asked to come back and did so for the purpose of being identified by Fisher in connection with the statement. Officer Vogelsang was seated at the typewriter and Fisher was at his left at an angle facing him where they could see each other. (Thereupon the witness pointed out on the photograph, the places where the different persons were.) Lieutenant Flaherty was sitting over here; Sergeant Felber was sitting here where he could see the (183) statement because he was taking the statement; I was sitting over at Officer Vogelsang's right, in that chair by the window; this chair back of Fisher was not occupied until Mr. Berkeley came into the room and that is where he sat. When he sat there Fisher had his back to him, and so far as I could observe, he did not see Mr. Berkeley and Mr. Berkeley did not say anything while he was there. Sergeant Felber made the opening statement to the defendant, stating what he was being held for and that he need not make this statement unless he cared to and that it could be used in court. Sergeant Felber asked whatever questions were asked by any officer during the statement after the defendant made his narrative statement (184). The statement that he didn't have to make any statement and that if made it would be used against him was typed by Vogelsang

as Felber said it to the defendant; the witness then said Felber and first directed Vogelsang to write the statement down, then had read it off to the defendant and had asked him at the end if the defendant cared to make a statement and defendant said "Yes". The statement was typed by Officer Vogelsang as the questions and answers were given. I did not observe the typing itself. After the statement was written, Sergeant Felber asked Fisher if he wanted to read it or if he would rather that we read it (185). He said that he would rather that Sergeant Felber read it and Sergeant Felber did so from the beginning up until that point. I heard it read and it was as I had heard the statements, the questions and answers given and was accurate according to my recollection. After it had been read to Fisher, he said there was one change he wanted to make. He said that at the place where the statement had the lady in the office when he came in, he wanted it changed because he was in the office cleaning up when the lady came in. That was written down as he said it by Officer Vogelsang (186). He had said in the first part of his written statement that the lady was there first when he came in. In his previous oral statement he had said that he was there when she came in. In other words, the correction in the written statement conformed to his previous oral statement in that regard. After that was done Fisher signed the statement with his left hand. Sergeant Felber and I witnessed the statement by signing and initialing each page; Fisher also initialed each page (187). The typewritten document consisting of four pages, marked Government Exhibit 33 and now shown to me, is the written statement made by the defendant Julius Fisher about which I just testified. The statement began at 9:02 p. m., and ended at 10:27, p. m., and those times were noted on the statement (188). At one point in his statement, Fisher mentioned the fact that Mr. Berkeley had told him on Monday of the complaint about the cleaning. Mr. Berkeley was brought in and Fisher pointed him out a, the Mr. Berkeley to whom he had referred in his statement (189). After the statement was finished Fisher was sitting there for a few minutes and when that piece of wood was brought in to him, then he was taken over to the fingerprint bureau. From headquarters he was taken to 4806 Hayes Street where he got

the ring out of the smoking stand and gave it to us. Sergeant Felber, Sergeant Crook and I went with him. We were admitted to the house by Mrs. Susan Washington, who said she was the grandmother of Fisher's wife (190). His wife was there at that time also. He greeted her but did not say anything to her about the case (191). Government Exhibit No. 20, now shown me, is the ring and it was in the ring box now shown me, which is Government Exhibit 34. Fisher said that was the ring he had taken off the lady at the Cathedral and that the box was his own box in which he put the ring. (The ring and box, Government Exhibits 20 and 34, were received in evidence and the ring was shown to the jury) (192). After we left Fisher's house we went to No. 1 Precinct. On the way we stopped at Ninth and H, Northeast, and Sergeant Crook went in and bought cigarettes and gave them to Fisher (193).

CROSS-EXAMINATION

From the time Fisher was picked up at Perry's Grill at eight o'clock until the taking of the confession was begun at 9:02 p. m., he was never out of my presence or hearing. There was no discussion of the crime until we got him into headquarters (194). When we first got him into headquarters I asked him where he was employed and what his duties were, and he said he cleaned the curator's office, the card room and the Cathedral library building. (Thereupon the answer, the witness related substantially as he had before the verbal conversation with Fisher) (195). The questions put to Fisher were put to him by me and I was the first person who questioned him (198). Most of the points in the oral confession were brought out by Fisher in the written confession.

Q. There were no discrepancies between the oral confession and the written confession?

A. Well, I recall one.

Q. All right.

A. I don't recall very many. I do recall one right now.

Q. All right, give it to us.

A. In his oral confession, he didn't tell us that she called him a black nigger at the time he was discussing

the complaint she had made, but in his written statement he did say she called him a black nigger.

Between the time we got the oral statement and the time he told us about this matter about the black nigger in the written statement was about ten or fifteen minutes, I should say (199). I do not recall any other discrepancy between his oral and written statements. Before Fisher went into the room where Officer Vogelsang was nothing was said to him about the fact that he need not talk, that he could stand on his constitutional rights, that anything he said could be used against him. No one struck him when we first went into the room with Fisher, or kicked him, nor did any one lay hands on him or touch his body with either hand or foot. At the time of the incident in the automobile where Fisher was pulling a gun out (200), his attitude was normal. He kept the same attitude through the written confession. No effort was made to determine his condition as to soberness because there was no reason for that (201).

At this point the Court adjourned for the luncheon recess (203) and before the cross-examination of the witness Scott was resumed the defendant was permited to call out of turn a witness named JESSE DOUGLAS ROLLO, who being first duly sworn testified as follows: I am the president of the Capital Chemical Company, 1050 30th Street, N. W., where the defendant Fisher was employed for approximately three years (204). He left this employment of his own volition. His reputation among the people where he worked for peace and good order was good (205).

Thereupon the cross-examination of the witness EDGAR E. SCOTT was resumed as follows: I did testify at the investigation held at the District of Columbia Morgue on March 3, 1944, in describing the events of the killing, as follows (206): "I would suggest that Sergeant Felber take over and testify about that, because he did the questioning." What I meant was that he did most of the questioning at headquarters including the written statement (207). Fisher's statement was that Miss Reardon screamed when he smacked her and she screamed and ran towards the far end of the floor, and that this was before he got the stick (208). During the taking of the written state-

ment; Sergeant Vogelsang wrote down every word that Fisher said. There was no situation in which, for example, Fisher was questioned back and forth until the answer was satisfactory to Sergeant Felber and then Sergeant Felber told Officer Vogelsang to put that down. The only situation even resembling that would be if Sergeant Vogelsang should ask the defendant over. I believe he did ask him over once or twice as he didn't understand the exact wording the defendant said to him when he was writing. The paper was headed "Homicide Squad", with the date and title of the case, the defendant's name and what he was being held for. He was told that, and that was all put down. We asked him some questions about what his name was and where he lived and he was also told that he was being held about the death of Catherine Cooper Reardon and asked to make a statement about it, and he was also told that he was not required to do so unless he desired; that it must be a voluntary statement on his part (209) and that it could be used in court at his trial; that was put down as Sergeant Felber said it to Officer Vogelsang. Then Officer Felber read that portion off to the defendant so that he would understand it. He then asked Fisher if he cared to make a statement and Fisher said "Yes." The rest of it was written by Officer Vogelsang as Sergeant Felber and the defendant were talking. After he had said "Yes", meaning that he desired to make a statement, he was told by Sergeant Felber to go ahead in his own words and to talk slowly and distinctly so that Officer Vogelsang could hear him, and it would be taken down in typewritten form. That is when he started the direct statement and told the whole situation about the trouble he had. When he paused in talking, Sergeant Felber started questioning and (210) those questions and the answers given by the defendant were put down by Officer Vogelsang, except for one or two occasions when Officer Vogelsang asked Fisher again about his wording and had him repeat it. The statement was taken without interruption. There was no substantial delay. There was no question asked him during the written statement that is not on that paper there. There was nothing ever asked him in the verbal statement as I recall it, other than what I have testified about. The written statement was read to Fisher by Sergeant Felber.

The correction was made in it immediately after the reading (211), and then it was signed by Fisher in the presence of Sergeant Felber, Officer Vogelsang and me. All the questions which appear in the written statement were Sergeant Felber's questions. I asked none of them. Fisher's clothes, which I saw in the closet, were rolled up, and in a far corner of the closet. I did not see them until I pulled the clothing in the closet back, looking for Fisher. I am unable to say that there was any evidence of an attempt to conceal the clothes, and I am likewise unable to say whether they had just been carelessly thrown there (212).

REDIRECT EXAMINATION

It was I who asked most of the questions during the fifteen-minute questioning, which was not put in writing. The written statement took an hour and twenty-five minutes. That is what I meant when I said that Sergeant Felber did most of the questioning. The morning following the verbal statement, I made notes of it for my own use (213) and I have refreshed my recollection since by reference to these notes. I have these notes with me at this time.

I saw part of this wood brought into the Homicide Squad after Fisher had signed his written statement. Sergeant Ennis had some wood about that time in the witness room as you go in the Homicide Squad. Lieutenant Flaherty brought a piece of it and showed it to the defendant and the defendant looked at it, and said it was a piece of the wood that he used when he struck the lady at the Cathedral (214). The wood had blood stains on it and was of the general appearance of this piece of wood in front of me, but I am not positive which one of those pieces it was.

RE-CROSS EXAMINATION

When I say it was blood stained, I mean that it appeared to me as blood. I did not make any tests on it (215).

Thereupon James P. Berkeley was recalled as a government witness and testified as follows:

I was in the Homicide Squad on Thursday night, March 2, 1944, when a statement was taken from Julius Fisher. When I first entered the room, Fisher was sitting at a desk giving a statement to Detective Sergeant Felber. I identify the picture, Government Exhibit 32, as the room where this statement was taken. Present in the room besides Fisher were Lieutenant Flaherty, Detective Sergeant Felber, Detective Sergeant Scott and another detective by the name of Vogelsang (216). Fisher's back was towards me. I was there for five or ten minutes. I sat back of Fisher and so far as I know, he was not aware that I was there. While I was there I heard him say this: That he came to work and the lady came into the room and he said, "I understand that you made a complaint about my not cleaning under your desk." She said something about the place being dirty and he said he did not clean it every day, but he had been cleaning it. She said, "That is the way with you niggers"—If I may use that expression, as that is what he said—"the Cathedral is paying you money, and you are not doing your work." He said he slapped her and she screamed and (217) ran to the other end of the library. He said: "I then ran upstairs and grabbed a stick of wood. I hit her with the stick of wood and she sort of fainted." He said, "Then I dragged her downstairs and finished her." At this point I left the room. While I was in there no threat was made against Fisher. He was not struck or kicked, nor offered violence by anybody, nor threat of violence by anybody. He was not given any promise of benefit if he did confess. He did not appear to be drunk (218), but appeared to be normal. His speech was not different from what I had noted. His manner was absolutely lacking in emotion. (Government Exhibit 33, being the written statement, was handed to the witness, and he was asked to indicate on it the point at which he came in and the point at which he left.) I came in just about here (indicating the fourth line of the narrative part, and the sentence which reads, "I arrived there shortly after 9:00 a. m."). This is where I left. (Indicating the sentence, "That is where I finished her".) I remember him

very distinctly saying that. (This is the third line on page 2) (219). I have read that part of the statement beginning and ending at the points just indicated, and so far as I now recall it represents correctly what Fisher said as I heard him speak. After I left the room, I was asked to come back later on. On this occasion I entered by another door so that I faced Fisher. He was asked if I was the one referred to as the boss, and he said "yes". I then left the room (220).

CROSS-EXAMINATION

(Part of the written statement was read to the witness as follows: "At the time Mr. Berkeley was talking to me about this complaint, he told me not to pay any attention to this lady because she was half cracked." The question was then asked the witness whether he was present when Fisher said that.) I think there is a little misstatement there. I told him not to say anything to this lady because she was peculiar or hard—that is the word, I think, was used (221). I have been at the Cathedral for twenty years and was there when Miss Reardon was first employed. She always did library work, but at one time she worked in the library of the College of Preachers, which is in a separate building. She had been in this building for perhaps two or three years. This building had been cleaned by the janitors from the College of Preachers (222). The cleaning of the library building had been serviced by the men of the College of Preachers and had not been satisfactory.

Thereupon Walter B. Vogelsang was called as a witness for the United States and being first duly sworn testified as follows: I am a private in the Metropolitan Police Department assigned to the Homicide Squad and my duties are the taking of statements. I took the written statement marked Government Exhibit 33, which is now shown me (224). It was taken in the room shown in the picture, Government Exhibit 32. This was on Thursday evening, March 2, 1944. The statement began at 9:02 and ended at 10:27 p. m. Present while it was being taken were Sergeant Felber, Sergeant Scott, Lieutenant Flaherty, and for part of the time Mr. Berkeley from the Cathedral. I was seated at the typewriter. Fisher was

to my left, facing me; Felber was directly at my left-hand side. Fisher was advised that his statement must be made freely and voluntarily (225). This was written down on the statement, then read to him by Sergeant Felber. I wrote it on the statement. This is a form used in all cases and I know that form. I copied it from another statement. Sergeant Felber read it to Fisher. Sergeant Felber did the questioning (226). After the preliminary warning was read to Fisher, he was asked if he would make a statement and he replied in the affirmative. At that time he was sober, he spoke coherently, and he answered questions intelligently. As I recall it, no questions had to be repeated to him. I saw him walk during that night and that walk was steady. His speech was clear (227). No threats were made against him. No violence was offered him. No one pushed, kicked, or beat him. No promises were made at any time. Questions were put to him in regard to how long he had worked at the Cathedral. Following that there was a narrative made by him. He was asked to go ahead and tell in his own words just what happended. That narrative part which goes from the first page to the second for about five lines (228), those were Fisher's own words. The statement, "I went to work at the Cathedral yesterday morning, March 1, 1944, at 7:00 a. m.," is Fisher's statement; he gave that time himself. My recollection is that that narrative part was given by him without interruption. As the statement was made by him, I typed it. He was told to talk slowly so that I would get it. I did not have to stop him at any time in order to catch up (229). After the narrative part of the statement, Fisher was questioned by Detective Sergeant Felber, and Fisher answered the questions. I wrote the questions in exactly the words that were given, and the answers in exactly the words Fisher used. There were no questions put to him nor any answers made by him which do not appear in that statement. Nothing is paraphrased there. I tried as far as possible to get his exact words. Just before the statement was completed he was asked about his education, and he requested that the statement be read to him (230). He said that he could write his name and read a little. The statement was read to him. The last page was left in the typewriter and Sergeant Felber read the last

page to him while it was in the typewriter. Then Fisher asked that a correction be made and (231) that was done at the bottom of the statement before the last page was taken from the machine. Then the statement was turned over to Sergeant Felber and he took Fisher in the next room where there was a desk for him to sign it. I did not go with them. I did not see it signed. I identify by my signature and initials Government Exhibit 33 as the written statement taken on that occasion.

CROSS-EXAMINATION

I have been taking statements in the Homicide Squad for a little more than a year (232). In that time I have taken a considerable number of statements. If a man talks in an ordinary conversation, I have no trouble keeping up with him. There was not any trouble dragging information out of Fisher. He talked right along and spoke freely without hesitation (233). The whole statement took one hour and twenty-five minutes. It is about three and one-half pages. It took Sergeant Felber twelve or fifteen minutes to read the statement to Fisher. There were no preliminary questions asked him which do not appear on the paper; nothing occurred which is not on that paper. My recollection is that I copied that preliminary warning off another form, and that Sergeant Felber did not dictate that form to me (234).

REDIRECT EXAMINATION

Three carbon copies were made of this statement. As one page would be taken out, the carbon paper would be removed and other paper would be arranged and put into the machine (235).

Richard J. Felber, recalled as a Government witness, testified as follows: After Sergeant Scott and I arrived at headquarters with Fisher, questions were asked him before he made any written statement. These questions were asked by Sergeant Scott and myself. This was in the squad room of the Homicide Squad. That is a different room from where the written statement was taken (236). At that time Fisher was shown a yellowish pull-over sweater, a pair of grey tweed trousers, and

a white and green striped shirt, which clothing he identified as his own. (Thereupon the witness (237–239) testified regarding the verbal statement of Fisher substantially the same as Sergeant Scott had testified regarding it. Among other things, the witness Felber testified that after the typewritten statement was taken Sergeant Ennis or Lieutenant Flaherty showed Fisher a large stick of wood and asked him if that was it, and Fisher said "Yes"; that he remembered it by a knot that was at the end of it or something) (240). During the time of this questioning no threats were made against the defendant; he was not struck or hit; he was sober; there was no irregularity in his manner of speech (241); his walk was steady. No terms were made to him if he should make a statement (242). Identify Government Exhibit 32 as the written statement taken from Fisher that night. I asked the questions in the written statement (243). He made the statement and signed it in my presence and initialed each page. Shortly after the statement was signed, we left Police Headquarters at about 11:15 p. m., and went to 4806 Hayes Street, N. E., the home of the defendant. Sergeant Scott, Sergeant Crook and I went with Fisher. Fisher went to a smoking stand next to the bed and took out a white box containing a ring, which he said he took from the finger (244) of the deceased on March 1, in the sub-basement at the library. He turned the ring over to me. I identify Government Exhibit 30 and Government Exhibit 34 as the ring and the box. The following morning at ten o'clock, Fisher was arraigned before the United States Commissioner (245) on a charge of murder. At this point the following occurred:

Mr. CURRAN. The government is ready to offer Exhibit No. 33, if your Honor please.

Mr. HOUSTON. Your Honor has already ruled on that. Will you just allow me to renew my objection?

The COURT. Yes. It will be admitted over your objection.

Whereupon, Government Exhibit No. 33, being the written confession of Fisher, was received in evidence (246).

CROSS-EXAMINATION

From the time of Fisher's arrest until the written statement was finished, Fisher was not out of my presence. Nobody hit him or knocked him at any time before he was questioned orally or during the time he was questioned orally. This oral examination had been completed a few minutes before we went into the room where Officer Vogelsang was. Before that time we had gotten the essential fact that Fisher's action had caused Miss Reardon's death (247). We had also gotten from him in an oral statement in substance that there had been this argument between him and Miss Reardon about the complaint of the dust and the dirt around the desk; that he had slapped her and that she had screamed; that he struck her over the head with a stick; and that after that he had choked her; and after that had stuck a knife in her neck and had taken the body and put it in this crypt or recess, taking her pants off and tried to wash up the blood, and then thrown the shoes and pants down there by the body. Up to that time, Fisher had not been advised of his constitutional rights to keep his mouth shut.

Q. What further information was there that he could keep silent about that is in this statement here that contains the warning that you had not already obtained by oral questioning? (248).

A. Well, all I can testify to that is that is the procedure, the first talk to ask the defendant about what he did; then, after he has related it, not as thorough as it sometimes is in the statement. In other words, we get just what his story is about, what occurred. Then we ask him if he cares to make a statement in writing. If he does, then we take it down in typewritten form. We know in substance what had occurred from the verbal statement. It is the procedure to obtain a signed statement or typewritten statement.

Q. What is there in this typewritten statement that you didn't already know as a result of the oral statement?

A. One thing I recall that is in there that the defendant said nothing about at the time that we got the oral statement was that one point in the questioning he said the reason that he slapped Miss Reardon was that she called him a black nigger. That is one part that I recall. I just can't recall just what other wording there might be that is different. I know that is one particular instance I do recall that he didn't mention in the oral questioning that he did mention when the typewritten statement was taken.

Q. What you are trying to do, then, in the written statement was to get a full explanation of the crime, isn't that true?

A. That is right; sir.

Q. In other words, your written statement is supposed to be complete and contain the answers as to the crime (249).

We did not ask Fisher whether that conversation between him and Miss Reardon, about the complaint, was bitter or just spoken, or whether he spoke to her in an ordinary manner or tone. We did not (250) ask him why he didn't use the knife, or why he ran all the way upstairs to get the stick, when he had the knife in his pocket, nor why he didn't choke her first. We did not ask him what he meant by her squawking. Sergeant Scott asked why he took her pants off (251) and he said to wipe up the blood he had dropped along the way in carrying her and dragging her. He was not asked why he took off her pants rather than some other article of her clothing (254). (Thereupon counsel for the defendant directed the witness to read Government Exhibit 33, being the written confession. The witness read the confession as follows, beginning at 17 minutes to three) (255):

Office of the Homicide Squad, Metropolitan Police Department, Washington, D. C., Thursday, March 2, 1944—9:02 p. m.

Homicide Case: Death of Catherine C. Reardon, white, 37 years, on March 2, 1944.

Q. What is your full name, age, and place of residence?

A. Julius Fisher. I am 32 years old and live at 4806 Hayes Street, Northeast.

By Detective Sergeant Felber:

Julius Fisher, you are being held on account of the death of Catherine C. Reardon, white, who was pronounced dead at 10:45 a. m. March 2, 1944, from injuries which were alleged to have been received on March 1st, 1944, in the Library of the Washington Cathedral. You have told me briefly that you inflicted said injuries. I now ask you to make a complete statement regarding what knowledge you have about this matter so it can be taken down in typewritten form. Before doing so I advise you that your statement must be made freely and voluntarily; also, that your statement, if made, will be used in Court at your trial, if it becomes necessary. After hearing what I have just told you, do you want to make a complete statement?

Answer by Julius Fisher. Yes; of course (256).

By Detective Sergeant Felber:

Q. Where are you working at the present time?

A. At the Washington Cathedral.

Q. How long have you been working there?

A. I have been working there since the 20th of December 1943, up to yesterday, and I am still employed there.

Q. Did you work today?

A. I did not.

Q. When is the last day that you did work?

A. The last day I worked was Wednesday, March 1st.

Q. Did you know the Assistant Librarian at the Washington Cathedral, Miss Catherine C. Reardon?

A. There was a white lady that works in the library, but I did not know her name.

Q. While in this library on March 1st, 1944, did you have an argument with this lady that resulted in your having to assault her?

A. Yes; that is right.

By Detective Sergeant FELBER:

Now Julius, tell me in your own words, just what occurred there which caused you to assault the lady in the Library and everything that happend during the trouble (257).

By Julius Fisher:

I went to work at the Cathedral yesterday morning, March 1st, 1944, at 7:00 a. m. I worked in the card shop, from 7:00 a. m. to 7:30 a. m. Then I went to the Curator's Office and cleaned up there, which took about 45 minutes. I left there and went to the Library and arrived there shortly after 9:00 a. m. When I arrived there the white lady who works in the Library was there. I said to her "I understand you had a complaint about the floors being dirty" and she said "Well, I see considerable dirt or dust under my desk." I told her that I could not understand how she could have, although I did not clean the Library every day, though I clean it enough to keep the dust down during the time that I am cleaning the books. Then she squawked up and said "I don't see why you can't clean it every day cause you are getting paid for that." Then she said "You black nigger" and I said "Wait a minute I don't like that" and I smacked her. She ran down in the back and she started hollering. I had actually gotten mad at that time and ran upstairs and got a stick of wood from the fireplace and came back down. She started hollering again and I struck her over the head with (258) the stick of wood. Then I also said "If I don't kill you, it will be the last of me." She fainted then and I drug here from there to the basement; that is where I finished her. Before I left I stuck her in the throat with my knife. That is the last thing that I did. I told the truth. That is all I know.

Questioned by Detective Sergeant Felber:

Q. Did this lady report you for not cleaning the library up?

A. Yes; she reported me to the boss.

Q. Did the boss question you about her complaint?

A. He did.

Q. When were you questioned about this by the boss?

A. That was about Monday of this week.

Q. In your statement you said that you assaulted this lady with a piece of wood, where did you get the piece of wood from?

A. On the main floor, near the fireplace, where there is a stack of wood kept.

Q. When you first went down to the library, did you carry this piece of wood with you?

A. No, I had not (259).

Q. How many times did you hit her with the piece of wood?

A. Only a couple of times, that is all.

Q. At any time did you choke this lady?

A. I did.

Q. Where and when did this occur?

A. She ran toward the back of the library room and after I hit her with the piece of wood, I choked her.

Q. Why did you choke her?

A. Cause she kept screaming.

Q. Was there anyone else in the building at that time, other than you and this lady?

A. No one else that I know of.

Q. How did you get the lady from where she was choked to the washroom?

A. She passed out and I drug her from there.

Q. How did you get her from the washroom to the sub-basement, that is down the ladder?

A. I taken her down there in my arms.

Q. Did you inflict any blows on this lady after you got her in the sub-basement?

A. I did not. The only thing I did was to take my knife out and cut her throat.

Q. When you left the lady in the sub-basement was she unconscious? (260).

A. I don't know, but she was not moving.

Q. Did you remove the lady's under pants?

A. I did.

Q. Why did you remove her underpants?

A. To finish wiping up the blood.

Q. Where did you wipe the blood from?

A. Different places on the floor of the library.

Q. What did you do with the under pants after you finished wiping up the blood?

A. I threw them down in the basement where I left her at.

Q. At any time did you have reason to use the wash basin?

A. Naturally, I had to wash the blood off the floor and I rinsed the pants in the basin.

Q. After putting the body in the basement, did you remove any personal property from this lady, other than her under pants?

A. Nothing other than her ring, which I took from her finger.

Q. What did you do with the ring that you removed from her finger?

A. I carried it home and put it in my ring box in the drawer of the smoking stand by my bed (261).

Q. Do you know where this lady's coat, hat and pocketbook are kept in this building?

A. She usually keeps them on the 3rd floor.

Q. At any time Wednesday, did you have her coat, hat and pocketbook in your possession?

A. No indeed.

Q. What time did you leave the Cathedral grounds on Wednesday, March 1st?

A. Around 11:00 a. m.

Q. Where were this lady's shoes when you last saw them?

A. When I was dragging her, her shoes came off her feet: After I took her to the basement I threw the shoes behind her body.

Q. After this trouble was over and you left the Cathedral grounds, did you discover any blood on your clothes and shoes?

A. Naturally I did.

Q. Describe to us what clothing you were wearing at the time this assault occurred?

A. I was wearing a pair of gray tweed pants, which had blood down the knee and spots on the bottom part of the left leg and spots up in front. I also had on yellowish pull-over sweater, which had blood around both cuffs. I had on a green and white striped shirt which (262) also had blood on the cuffs. I was wearing tan shoes, but I did not notice any blood on them. I did not have any hat on at the time.

Q. What did you do with this clothing that had the blood on it?

A. After I got home I took those clothes off and threw them in the closet in my bedroom.

Q. Do you remember how you put them in there?

A. I rolled them up and I believe I stuck everything in my sweater and threw them in the closet.

Q. Did you have any intentions at all of committing rape on this woman?

A. Not by any means at all. I didn't even have that in mind.

Q. Then, your main reason for assaulting this woman who worked in the library was because she reported you for not cleaning the floor of the library, is that right?

A. Yes; that is right.

Q. What is the name of the man who you refer to as the boss, who questioned you about the complaint made by this lady?

A. Mr. Berkeley.

Q. At this time Mr. Berkeley stepped into the room; is he the Mr. Berkeley that you refer to? (263).

A. Yes, sir; he is.

Q. Is there anything further that you would like to add to your statement that has not already been covered?

A. At the time that Mr. Berkeley was talking to me about this complaint he told me not to pay any attention to this lady, that she was half cracked.

Q. How much education have you had?

A. I went to the 3rd grade at school.

Q. Can you read and write?

A. I can write my name and read a little.

Q. Do you think you have enough education to read this statement, or would you prefer to have someone read it to you?

A. I would rather for one of the sergeants to read it to me.

Q. Have you made your statement and answered my questions freely and voluntarily, without any force or promises being used or made by anyone to obtain the same?

A. Yes; that is right.

At this point the complete statement, questions and answers were read to Julius Fisher by Detective Sergeant Richard J. Felber, and he stated that "The only thing I want to change in my statement is that in the 13th line from the bottom of page 1, where it says "When I arrived (264) there the white lady who works in the library was there." I want to correct this to read "The white lady arrived shortly after I got there." Everything else in the statement is all right.

(Signed) J. FISHER.

(Signed) RICHARD J. FELBER.

(Signed) EDGAR E. SCOTT,

WBV.

10:27 p. m. (265).

The witness completed the reading at 7 minutes to 3 o'clock. Those answers are Fisher's own words. Where the change is referred to as in the thirteenth line from the bottom of page one, that page and line number were done by the clerk who wrote it down, covering the line and finding it was the thirteenth line. Fisher did not know what line it was. The "13th line from the bottom of page 1" was inserted in there. Fisher cooperated in giving the statement and gave his answers promptly and readily (266). He would hesitate on some things, pause momentarily to get his thoughts together, and then answer. Officer Vogelsang was able to write along just as Fisher talked. I would ask the question, then Vogelsang

would type it, then wait for the defendant's answer, then he would type that, then I would ask another question and go on. Fisher was asked to speak slowly (267). "The heading of this statement Homicide Squad, what the case was, was already on the statement, and from here on it was started after we sat down." The preliminary warning telling Fisher what he was charged with and asking him if he wanted to make a complete statement was read by me to Fisher after Officer Vogelsang wrote it (268). I did not time the taking of that preliminary warning so as to be able to say exactly how long it took. Officer Vogelsang had his paper in the typewriter when he came in. He knew we were coming. If you want me to guess at the time I would say three to five minutes or something like that. The whole statement took about an hour 25 minutes (269). He put the time 9:02 on when he started after the heading. He wrote at ordinary speed (270).

Thereupon the government offered in evidence the stick of wood, Government Exhibit 30. It had a knot on the end of it. Counsel for the defendant objected on the ground that the source of the wood as to the source from which it came into the library building was not shown; that the stick of wood had not been properly identified; that the portion supposedly shown the defendant had not been identified; and that the parts that made it up had not been shown to contain human blood or any other type of blood or blood at all (271). The Court ruled that the stick would be received in evidence and stated in front of the jury, that the jury had the right to judge whether or not it was the stick assembled, and whether or not it was the weapon used; that there was enough evidence and enough circumstances to make it admissible, leaving it, of course, to the judgment of the jury on all the circumstances as to whether or not it was in fact the weapon used. To the ruling of the Court, admitting the stick in evidence, counsel for the defendant duly noted an exception.

Thereupon the United States Attorney announced that the government would abandon Counts 3, 4, 5 and 6 of the indictment, and that the government rested its case (272).

Immediately counsel for the defendant called the defendant JULIUS FISHER to the stand, who being first duly sworn

testified as follows: I am thirty-two years of age, was born in Alexandria, Virginia, and my mother's name was Martha Bigsby Fisher (273). I do not remember her because I was too small when she died. My father's name was William Fisher and I do not remember him because I was too small when he died. I was reared in King Street, Alexandria by my grandmother. I have two sisters (274) and five brothers. We did not all live with my grandmother; just a couple of them. I went to the third grade in school, not all the way through it. I stopped in order to go to work to help out my grandmother. I lived with her until she died, at which time I was quite large. Then I went to live with my aunt, Fannie Brightley, who lived next door (275). My grandmother lived in Lynnwood, Maryland. I was brought from Alexandria when I was a small boy to live with my grandmother. After I lived with my aunt, I did not go to school. I did different kinds of work, like working on a farm (276). I finally came to Washington and did different odd jobs. I got a job with Colonel Kellam as chauffer and butler (277). I averaged about twenty dollars every two weeks. I lived in. I kept that job for about five years and I quit because I couldn't get a raise. After that I worked at different jobs, chauffeuring and butlering. I was an elevator operator. I went to work at the Capital Chemical Company. My job there was exterminator. That was household fumigation work (278). I made seventy-five dollars when I started and I finally got a raise. I left there because I had an argument. The boss wanted us to work on Sundays and we had an argument about that, and I had been working every night and day and in fact it was the only day I had to be with my wife. I left and about two and one-half weeks later went to the Cathedral. Meantime I had been in Mr. Rollo's house painting (279). At the Cathedral I was making one hundred and ten dollars a month. I was hired by Mr. Berkeley. I went to work December 20, 1943; I started as a janitor. I was to take care of the office building, Christmas card shop and the library and the choir room. I did not have to punch a clock, but would report in the morning and go right on and do what I had to do without reporting to anybody. I carried my own set of keys to the building so I could get in (280). On that job

I was treated all right and I liked the job very well. I had no complaint on the job until I had this complaint in the library. I did not know anything about this complaint until Mr. Berkeley told me. Before that Miss Reardon had not spoken to me about doing anything for her except she had asked me a couple of times if I had dusted the tables in the library on the first floor. She asked me if I had watered the plants there (281). Miss Reardon and I spoke to one another. I did not feel bad about the report I had gotten, because I had never thought about it. I would speak to her every time I saw her and she would speak to me unless she didn't hear me. Sometimes she may not have heard and didn't speak. There was no conversation between us. When Mr. Berkeley told me about the complaint he said, "Don't pay any attention to her, because she is half cracked." This was about sever—several days before Miss Reardon's death (282). Meantime I had seen her every day and spoken to her and I did not mention to her anything about the complaint to Mr. Berkeley, because I went over there the next day and cleaned up and I thought it was satisfactory. The morning this death took place I came to work about five or ten minutes past seven. Of course, I had been out all night that night before. Then I had stayed in town, and I caught the street car on Florida Avenue, went up to Eighteenth and Columbia Road, and transferred and caught a bus to Dupont Circle and rode out to where I was going to work. I went first to the Christmas card shop and cleaned up there (283). I usually took off my overcoat and outer clothes and took them with me from building to building. After cleaning out the Christmas card shop, I went to the office building. I finished there a little after eight, about 8:20 and from there I went to the library. Miss Reardon was not there when I got there. I had finished cleaning when she came in. In addition to taking care of the floors and dusting the furniture I cleaned the books in the library every morning (284). I would clean a couple of shelves a day. When Miss Reardon came in this morning I was cleaning books close to her desk, right behind the first stack. (Witness shows the stack on Government Exhibit No. 9, and the desk on Government Exhibit

No. 10) (285). I was working right behind the stack cleaning books there (286). I heard the door to the building open. There was no screen door there at that time, but just a heavy wooden door. When I went in the building that morning, I had not locked the door behind me. The door was shut but unlocked. After hearing someone coming in the door, I heard someone walking up the stairs. I believed it was Miss Reardon. I was in the stack room (287). I heard someone open this other door leading up to the attic. Finally I heard her come back down again. She came down to the basement. I saw it was Miss Reardon. She passed by me, went to the back with some books on her arm. When she came back she passed me. I saw she had picked up another book down there, laid it on her desk to look through it. Went on back upstairs with some books in her arms. Meantime I was still cleaning books (288). She came back down and went to her desk and I was still cleaning books. She fooled around her desk a few minutes then. She asked me if I had dusted her desk, and I said "Yes". Then she said, "It certainly doesn't look like it." I walked out from behind the stacks and in front of her desk. I said, "I have dusted the desk. I always try to keep the place clean," and I asked her if she was trying to make trouble for me. I also asked her if she had reported to the boss about her desk. She said, "No", that she had seen dust and dirt around her floor. She then spoke up and said, "You black 'nigger' you should be able to keep this place clean. That is what they are paying you for." I got angry at what she said. Then I smacked her. I felt like I got angry inside. I felt like something rose up in my chest like that [indicating] I smacked her and she ran out from behind the desk, around toward the back of the stacks. No white person had ever called me a 'nigger' before (289). I had been called that by my own colored people. I had never been called that before an in opprobrium, anger or criticism. She ran out from behind her desk, down toward the back, screaming. I started upstairs, to run up. The screaming seemed to have gotten on my nerves. I got scared and nervous. I was running on up the steps, with her all the time screaming. When I got up to the top of the

steps, the noise got so loud, it kept scaring me. I ran into the library, got the stick of wood, ran back downstairs and started to striking her with it. The stick broke. She was still screaming, and I began choking her then. She seemed to have become unconscious and I taken her by the hand and started to drag out (290). When I struck her she was standing about a little table down back of the stacks; a little table was down there on the righthand side, as you go down towards the window. At that time it looked as though she had started trying to come back up towards me (291). When I struck her with the stick I was not trying to kill her; I was just trying to keep her from making a noise. When I began choking her, I was not trying to kill her; she started hollering and I tried to stop her from hollering. When she went limp, she evidently fainted. She went down on the floor. Then I began choking her because she was still hollering. She stopped finally and I did not strike her any more after the noise had ceased. The next thing I did was to take her by the hand and start dragging her through the stacks (292). Her ring pulled off in my hand. I dropped it in my pocket and continued to drag her on into the bathroom, where I left her laying and dove out the bathroom and got some toilet tissues to clean up the spots of blood. I wanted to clean up the spots of blood because I didn't want to leave the library dirty, leave awful spots on the floor. I wanted to clean them up. While I was up there with the tissue paper cleaning up the spots on the floor, she started hollering again. She kept hollering, seemed like to me. She kept trying to holler. I took out my knife and stuck her in the throat. My idea was just trying to stop her from hollering, is all I can think about. The noise kept on getting on my nerves. After that she stopped hollering. I went to stand up and I noticed that door leading down to that pit. I opened that door and got down in that pit and drug her up there, taken her down in my arms. While I was taking her down, her dress flew up (293), ran up to her chest. I saw her under pants. I thought that would be a good thing to clean up that blood with. I got her down. I pulled them off, pulled her up side the wall and left her there. I came back up, wet them under the faucet, went around cleaning up the spots of blood on the

floor. I threw the things back underneath there, where I left her body. Then I got my coat and hat, went on and went home. At that time I did not know whether she was living or dead. The sweater, the trousers, the shirt that have been exhibited here by the government are my clothes, which I had on at that time (294). As I went home I never thought anything about my clothes being messed up. I did not know whether the blood that was on the trousers showed up or not. I did not pay any attention to the blood on my clothes. I just got my coat and hat, put them on and went home. I took the street car at Wisconsin Avenue, rode on to Fifteenth and New York Avenue and transferred from there. I would get off at 48th Street. I live at 4806 Hayes Street. I was paid on February 29, the day before March 1, 1944 (295). I had money on me March 1. On March 1, I made no attempt to go out of town. When I went home, I taken out my bill folder and the other things I had in my pocket. When I pulled out the knife and the ring, I discovered I still had that ring that came off her finger. At that time I threw it up on top of the smoking stand. I pulled off my clothes, threw them in the closet and went to bed and stayed there until way late in the afternoon. I didn't think about anything I had done when I got in bed. I woke up later in the afternoon. It seemed like a dream or something telling me that I did something. And I woke up nervous and looking around. I found out I was in my own bed. I looked on the table and found this ring. I knew I got it from the lady (296). I kept thinking about it. I dropped the ring in a little ring box that I had in my smoking stand, to keep my wife from seeing it, and closed the drawer up. I stayed in bed and kept wondering what I should do. I couldn't think of anything to do, so I stayed in bed. I got out of bed the next morning and put some clothes on I had there. My wife went down and fixed my breakfast. I put a gun in my pocket that I had in my drawer there in the smoking stand, and came down and got my lunch, and started out to work. I rode up to Wisconsin and Massachusetts Avenues. There is a step there leading to the ground off Wisconsin Avenue. I got off and walked up into the ground, and I got nervous and shaky, and I couldn't go in there. So I stood

around awhile, two or three minutes maybe. Then I caught the street car and went back out Northeast. I got off at Twelfth and H Streets at the market and picked up some groceries my wife had asked me to bring home (297) that afternoon. I carried them home. I called my wife's grandmother and told her to take care of the things I had brought. I went back out, got the street car and went over in Georgetown. I had a title I had been carrying around to a car and I went over to Earl's Auto Service on M Street, near the bridge. I had a car, the motor was busted in it, and I told the man at Earl's Auto Service that if I could not find the parts I wanted, I was going to let him have it. I hunted around for the parts a long time and I got tired fooling with it. So this day I was going to let him have it. I had put the title in my pocket three or four days before that, intending to go by and leave it with him, but I had not been there. On this morning I went by there with the title, left it there with him and he wrote me out a check for twenty-five dollars (298), which I cashed at the Hamilton National Bank at Wisconsin Avenue and M. At that time I had seen no newspapers and did not know anything about the condition of Miss Reardon. I kept thinking about what I had done to her. I didn't know whether she was dead or alive. I was afraid to go up there and tell them that we had had an argument or a fight. So I caught the bus and went over to Eighteenth Street and got off and went into this Perry's Restaurant. It is at Eighteenth Street just above Florida Avenue. It must have been around ten o'clock or a little later in the morning when I got there (299). I was there off and on all day. I was in and out. But I stayed in there from five o'clock until the officer came in at eight o'clock. It never crossed my mind to run away and I made no attempt to run away. I had decided to give myself up, but couldn't get up enough courage to do so. When I was in Perry's Grill, I was sitting around with different fellows I knew, drinking every time any one would come in maybe. I drank most of the time I was in there. I was drinking whisky and soda. I have seen Detective Scott and Detective Felber on the stand (300). I think I recognize them as the officers who came in Perry's Grill for me. At that time I was sitting in the last booth in the

rear of the left-hand side, when these two men walked up and said, "Come on, Julius, we want to talk to you." The tall fellow walked up, had a paper in his hand, but I never did get to see it. The short (*sic*) The short fellow said, "He is drunk anyway," said "Come on." He picked me up. He didn't pick me up. I got up, started out, searched me around the lower part. Never did feel around my chest. Walked me out to the car. I got in. We started off. The car was driving along. I thought about this gun I had in my pocket. So I was going to take it out. He caught me before I could get it out. He snatched it out, said "You were trying to shoot me, weren't you?" I said, "No, I am not trying to shoot you. I am just going to use it on myself." So he carried me on down to headquarters (301). After I had gotten in headquarters a couple of minutes or so, set me down in a chair, one of them sat on the one side of me, the other in front of me. They started to question me about different things. I don't remember exactly what they said. They asked me some questions. I would hesitate about speaking right up. I was struck in the mouth by one of them, and the other one kicked me in the side. Then, I started to tell them, I said, that I did it. He said, "All right, tell us what happened." So after I finished telling them, they said, "What else did you take off this woman?" I said, a ring came off which I dropped in my pocket and carried it home with me. I never told them that I took the ring off. The ring came off. I never did say I pulled off the ring. Then they carried me in there, sat me down beside a table or desk or something and started questioning me again (302). I was never told that I had constitutional rights, not to make a statement if I didn't want to. I don't know whether the lieutenant wrote down everything that I said or not. I wasn't paying much attention to him. When they were questioning me, I was just sitting there telling them things that they asked me.

Q. Now, going into this matter, who spoke, did you speak to Miss Reardon about the matter or did Miss Reardon first speak to you? Who opened the conversation?

A. Miss Reardon opened the conversation because she had asked me if I had dusted her desk that morning.

When I started upstairs from the stacks where the lady was, I didn't go after anything. I was trying to run out (303). It seemed as though I was so afraid and nervous like something held me there. When I got in front of the door, I saw this wood at the fireplace and I ran there, grabbed the stick and ran back downstairs. When I got downstairs and after I hit Miss Reardon I didn't say, "If I don't kill you, it will be the last of me." I didn't say anything to her. When I struck her I never opened my mouth to her from the time she was standing at the desk until after I left her down there under those steam pipes. I struck her in the throat with my knife because she kept trying to holler. I took her pants off and wiped up the blood with them (304), because I didn't want to leave the place dirty. Before Miss Reardon called me "nigger," I had no feeling at all against her. At this point it was verbally stipulated that the defendant has no criminal record except convictions for drunkenness (305). At this point counsel for the defendant stated to the Court that no claim is made in the trial that the defendant was so drunk he could not form a specific intent. I was not trying to destroy any evidence when I put my clothes in the closet. I did not object to giving the police my underwear or shoes, or to telling them about the ring or taking them to where it was (306).

Q. Fisher, I wanted you to tell about one feature of your life, that is, do you drink at all?

A. Yes; I do.

Q. How old were you when you began drinking (308)?

Mr. CURRAN. I object.

Mr. HOUSTON. All right.

By Mr. Houston:

Q. When you were working for the Capital Chemical Company, did you drink very much?

Mr. CURRAN. I object.

Thereupon, counsel conferred with the trial judge, out of the hearing of the jury; as follows:

The COURT. They usually want to disclaim things of that sort.

Mr. HOUSTON. I don't claim he was drunk to the extent, as I said before, that he was incapable of forming specific intent, but to show that chronic alcoholism does have certain effects on the mind.

The COURT. Unless it has the effect of rendering him legally insane, it would be inadmissible. Do you claim that?

Mr. HOUSTON. I don't claim that alone has the effect of rendering (309) him legally insane. I do claim any element that goes to establish his capacity for deliberation is admissible under our test.

The COURT. Do you claim he is incapable of deliberating?

Mr. HOUSTON. I wouldn't claim he is completely incapable of deliberating, no, but deliberating as a fact. I think any evidence is competent which goes to establish the condition of his mind, that this is not a clear line between legal insanity and sanity, but I think that where you have a condition of mind as a fact, any evidence which bears upon that fact is admissible, so long as it goes to the condition of his mind at the time the act was committed.

The COURT. What is your position about that?

Mr. MURRAY. The condition of drunkenness is admissible in a first degree case to show that the mind is incapable of deliberating and premeditating. But a condition of drunkenness or near drunkenness, or chronic drunkenness, it seems to me, or any other condition, is not admissible for the purpose of showing the improbability in a given instance, that the person did or did not deliberate. If the evidence offered does not go to the extent of showing an incapability at the moment of the killing to perform the mental acts necessary to constitute the given crime, then that evidence, it seems to me, ought not to be received (210).

Mr. HOUSTON. Let me go further. We might as well develop this at the bench and have the whole thing out. I think the evidence of the psychiatrist will show certain flattening of the emotional reactions, a certain

dissociation between his recital of the facts and the situation that he is in, and his reaction to the present situation. I think it would show, also, certain perversion on his part, in a certain sense an inferiority complex.

Now, all of these are admissible and I think relevant to establish whether as a matter of fact at the moment or moments of the killing he had the deliberated and premeditated malice which the law requires to establish murder in the first degree.

The COURT. That is a matter for the judgment of the jury, though. As I observed a moment ago, it seems to me that these things that you have just suggested as impressing this psychiatrist have nothing whatever to do with a legal state of insanity, but simply takes his picture of the crime and of the defendant's conduct and of his later acts and words, and draws his own picture, his own conclusions as to whether or not the man did deliberate.

* * * * * *

Mr. HOUSTON. No; the degree of impairment of his deliberation (311).

The COURT. It isn't a question of degree of impairment. The question is did he deliberate, whether he had the same capacity for deliberation as another individual, is not the question. We all have a different mental capacity. "A" may think very much quicker than "B", "C" may be very much more cautious and prudent and deliberate in reaching a judgment than "D". And so you go on with comparisons of a group of individuals and they are different. The result is that if I am to permit this so-called psychoanalzation of this defendant, preliminary to an expression of opinion as to his particular capacity for deliberation, the Government on the other hand may call its experts and they may deliver their very learned opinions that he did not deliberate.

In other words, you have a parade of witnesses from the opposing side, taking the stand and expressing their

opinion as to whether or not the defendant is guilty of deliberation (312).

The COURT. The thing that bothers me, it isn't an individual case, but it seems to me its presents a very, very serious question whether or not we are to institute a departure from the well-established methods of trying a criminal case. And through the adoption of the methods you propose, set up an individual standard in each case as to the legal responsibility of a man to be presented through the so-called psychoanalzation of him, plus the expressed conclusions of the witness as to whether he did deliberate or was capable of the commission of some particular element of an offense, which, of course, both, means simply this: Whether or not in the opinion of that psychiatrist, he is guilty of the particular offense (313–314).

Mr. HOUSTON. What I am saying, instead of claiming absolute out insanity, I come and say to you that I think the situation is, while I don't claim the man was totally insane or sane, beyond the point of forming specific intent. Definitely clinical evidence established the fact that his capacity for deliberating was below normal, and there is certain evidence that we have which can be established objectively by objective experience as result of cumulation of medical knowledge.

The COURT. Let's get these questions definitely on the (315) record, as I feel sure I shall rule against you. I want the record to be clear.

First, you do not claim he was drunk?

Mr. HOUSTON. Definitely I do not.

The COURT. At the time of the crime?

Mr. HOUSTON. No.

The COURT. Secondly, you do not claim that by reason of long continued habits of drunkenness or use of alcohol that his brain had been so affected as to render him, through disease or derangement thereof, regularly insane?

Mr. HOUSTON. No, sir. What I do claim is the habitual drunkenness amounted to chronic alcoholism, and is a symptom of his mental condition, and that his mental condition is either that of a psychopath, or else it is a schizophrenic psychosis.

The COURT. The whole matter of this question, you do not claim that at the time of the commission of the offense he was, according to the well-established legal test, insane?

Mr. HOUSTON. I think there is the element of irresistible impulse in the case, definitely, for one thing. I think that the issue of irresistible influence is illuminated by the clinical records established through the psychiatric examinations.

The COURT. Of course, if irresistible impulse arises where one has not the will power by reason of disease or disorder of (316) the brain to refrain from wrong and do the right—if that irresistible impulse arises.

Mr. HOUSTON. I don't think that was the test in the Smith case.

The COURT. Yes, it is. That is the test.

Mr. HOUSTON. In the Smith case—you remember that case.

The COURT. Oh, yes. The test is threefold. They must all be present. First, was he able at the time of the commission of the crime to distinguish between right and wrong. Let us say he was. You admit that he was—that is, you don't claim that he was not.

Mr. HOUSTON. No; I don't claim he was not.

The COURT. Secondly, that if able to distinguish the right from the wrong, was he able to reject the wrong and do the right, or, to state it otherwise, was he by reason of a disease or disorder of his mental faculties, so impaired in willpower as to be unable to resist the wrong.

Of course, there is the preceding question as to whether or not he understood the nature and quality of his act. I assume you are making no question about that. Are you?

Mr. HOUSTON. The only thing I can say about that, is this: I don't think this man is the level of an imbecile, in that sense. I think he is about that. But here is his psychological record: First, low inability to go through school.

The COURT. He has a poor education (317):

Mr. HOUSTON. Yes. That is, mental tests show him incapable of performing certain functions under the Standard Benet test. This top mental age is 14. His average mental age is 11 years and 4 months. His chronological age is 32. He shows definitely certain flattening of the emotional reactions. He shows definite tendencies toward introversion.

The COURT. Emotional elements, of course, are not attributes of insanity.

Mr. HOUSTON. They may not be attributes of insanity, in one sense, but they are attributes of a psychiatric state. All that goes to the proposition to me, for the jury to determine, whether in fact at the time he was capable of deliberating.

The COURT. Well, of course——

Mr. MURRAY. May I ask this? Will your evidence show he was incapable of deliberating, or simply he probably did not?

Mr. HOUSTON. My evidence will show his deliberation was impaired.

Mr. MURRAY. Can't you answer me?

The COURT. You mean by that, it would take him longer to deliberate than it would a smart man, well educated man? That is what you mean?

Mr. HOUSTON. Not only that, but he couldn't actually do it. It is not a question of the time element, solely. He (318) hasn't the capacity.

The COURT. Of course, if he couldn't deliberate, he is not guilty. You said because he has an irresistible impulse.

Mr. HOUSTON. I tried to emphasize, it seems to me the difference between me and you is this: You say my evidence must show a complete incapacity beyond the line of legal responsibility in order to be admissible.

The COURT. No, no. I say your evidence must point to a mental incapacity, amounting to legal irresponsibility.

Mr. HOUSTON. Right. My position is that my evidence goes to establish something short of complete incapacity, but an impairment of capacity. I think that, as such, on the question of deliberation or premeditation is admissible. I stand there.

The COURT. But you have rejected another issue in the case, which is insanity. If you mean it that way, and that is, that you say the man had an irresistible impulse, and I have asked if you mean by that that he had a diseased derangement of his mental faculties which broke down his will power to the point that he could not resist, although recognizing that his act was wrong, then, of course, you do come within the legal test of insanity.

Now, if that is your position, I shall have to go along with you. Naturally, I expect some evidence to bear it out. And it will be an issue in the case which I will have to (319) present to the jury.

Mr. HOUSTON. It is my contention, because a man's condition, because of his impairment and his psychiatric trait I have mentioned to you, at the time he was faced with the situation of yelling, as he ran upstairs, that he did have an irresistible impulse, that he was incapable of resisting.

The COURT. That has got to be by reason of a disease, not an emotional state, but a mental state, a mental disease.

Mr. HOUSTON. That is what I am contending. It seems to me that I am contending for a mental state which is not saying it is always constitutionally over the line of legal irresponsibility, I will say it has reduced it below normal so as a matter of fact it bears out the question, illuminates the question, whether in fact at this particular time he was irresponsible. That is the way I read the Smith case.

The COURT. I don't read it that way exactly. In other words, I don't think the Smith case divides people into the normal and abnormal, and holds that a person mentally abnormal is not responsible for crime.

Mr. HOUSTON. I didn't say he wasn't responsible. I said it was a question of degree of responsibility, giving the jury——

The COURT. I don't believe we should go any further.

Mr. HOUSTON. May I suggest this?

The COURT. From what Mr. Houston says, he injects the issue which in effect amounts to the question of sanity, legal (320) responsibility, when he claims that this man, by reason of his mental state was unable to either deliberate, on the one hand, or to resist the wrong, on the other. Now, I may have, from all that has been said, I may have to guard pretty carefully the admission of evidence; because a good deal of it seems to be on the borderline. Still, I am a little dubious from what he says about my right to here, merely upon a discussion of this matter, to reject it altogether. I am afraid it might only not be legally improper, but might, if we take the full force of his claim, if we accept the full force of his claim at its face value, it would be rejecting the defense of insanity, don't you see. I can't do that. That would be unjust to the defendant, as well as legally contrary to the established law.

Mr. HOUSTON. Let me say——

The COURT. I do want the record to show, though, whatever develops here that I am not conceding for a moment that the case by any action of mine is a departure from well established rules and methods prevailing for the trial of criminal cases. You see?

Mr. HOUSTON. I understand that.

The COURT. I am interested in that.

Mr. HOUSTON. I see, but when you talk about the matter of deliberation, my contention is that Smith was perfectly capable of deliberating. He went about his work, in ninety-nine cases (321) out of a hundred.

The COURT. He could deliberate. The only question in the Smith case was as to the third test of sanity, whether he was capable——

Mr. HOUSTON. In that situation——

The COURT. ——of resisting wrong.

Mr. HOUSTON. In that situation.

The COURT. I think we understand it now.

Mr. CURRAN. What about your ruling on the admissibility of this man being intoxicated while he was employed at the Capital Chemical Company?

Mr. HOUSTON. That has no bearing.

The COURT. I hold that is inadmissible, unless you give assurance that it will be developed to the point where it will have some tendency by expert testimony, or otherwise, to show that it had so impaired his mental powers as to make him insane, in that it made him incapable of meeting the test of legal insanity in one or more respects.

Mr. HOUSTON. Let me tell you what the Doctor has said: I had rather tell you now. I asked the Doctor that specific question. I said, "Doctor, what is this matter of chronic alcoholism? We don't claim he was so drunk at the time that he didn't know what he was about, in the sense that he was just incapable of forming an intent on account of drunkenness." The Doctor said, "No; I am not contending that, whatsoever" (322). Drunkenness is not the cause so much as it is a symptom of the other condition.

Mr. MURRAY. You can't show symptoms.

Mr. HOUSTON. When your Honor laid down that condition, I wanted to explain to your Honor exactly the basis on which I was going to introduce the evidence.

The COURT. I think we will have to go ahead and develop it. It is pretty hard for me to have every possible question in mind and rule on it up here, before the rest, don't you see. I will rule in a concrete way, when they arise.

Whereupon, counsel resumed their places at the trial table, and the defendant's direct examination concluded with his

statement that during the last year or so, when he worked at the Capital Chemical Company, he drank heavily and he did have several convictions for being drunk (323).

CROSS-EXAMINATION

I was out all night the night preceding March 1. I was around town and different places. I was at Perry's Grill for one place. I was up at Fourteenth and P Streets. The first place I went, I was with a man named Carrington, who works for the Capital Chemical Company (324). I met him there. This was after I finished work, which was three o'clock. Carrington and I came over to town and stopped at a beer garden, which I think was at Fourteenth and P Streets (325). We stayed there quite some time. Exactly how long I do not know. I didn't eat any dinner that night. I didn't want any, thinking, I might go home. I am married and I did not tell my wife I would not be home for dinner that night. At Fourteenth and P Streets we had a few drinks and beer (326). I don't remember what time I left. When I left I was still in the company of Carrington. I don't know exactly where I went then. We did go to Eighteenth and U, Perry's Grill. We stayed there a little while; an hour or so I don't know just how long. We went down to Florida Avenue, stopped down at Seventh and Florida Avenue (327) at another beer joint. I don't know the name of it. Stayed there a few minutes. I left Carrington, fooled around the street a while, didn't go any place in particular. I went back in the beer garden again. This time I was alone. I stayed there quite a while. When I left there, the place had not yet closed (328). I stopped at her house on Florida Avenue. I said a house. I don't know exactly who the people were. There was a girl lived there I knew.

Q. Did you go there to see a girl?

A. Yes.

Q. What is her name?

Mr. HOUSTON. I object. If she has no connection with this case, I think it is immaterial.

The COURT. Objection overruled.

Q. What is her name?

A. Elaine.
Q. Elaine what?
A. I don't remember her last name (329).

I don't know what time it was when I went to see her. I went possibly to talk to her. I did talk to her. I was there practically most of the night. I didn't get home. I went to the Cathedral from Elaine's house (330). I got to the Cathedral about five or ten minutes past seven. I worked in the choir room in the office building. When I got to the library nobody was there. When I first got to the library I went right in and started working. I had been working on this job for two and one-half months, I guess. I didn't clean the library up every day. I would dust every day and I would go in that building every day. I knew where Miss Reardon's desk was (331). She was the the only one that worked there that I know of. While I was in there I heard somebody open the door. I heard somebody walking around up there and then going to the attic. Miss Reardon kept her clothes on a little seat in the back of the library reading room there. I don't know whether she kept them in the attic or not. I know I used to see them lots on a little chair in the back of the library when you come in the door there. I am speaking of the floor out toward the street, in the reading room where the fireplace was (332). Most of the time that is where she kept her clothes. I did not tell the police officers she kept her clothes in the attic. I don't remember saying to them that she usually kept her clothes in the attic on the third floor. I have never know her to hang her clothes on the hat rack beside her desk except once or twice (333). I have seen her clothes hanging there. I ran upstairs from the stacks where Miss Reardon was to get out of the building. I did tell Sergeant Scott and Sergeant Felber that I ran up there to get out of the building. I told them that the screaming got on my nerves. I told them that the reason I returned downstairs was because of the screaming (334). I told them I hit her to stop her from screaming. I don't know whether any of that is in the written statement which I signed or not. That statement wasn't read to me at all. I didn't know what they had for me to sign. I had been worried to death by them so much asking

me different questions, I went on and started to sign it, and they said, "You needn't put your whole name, just your initials." When I testified yesterday I used the word smacked (335). I don't know whether it is in that written statement or not. I don't know whether I did or did not use the word squawk. So far as I know I never told anybody that she squawked. I testified that all the blows were done on Miss Reardon in the basement before I dragged her body to the crypt. I didn't tell Sergeant Felber and Sergeant Scott that I put the knife in her throat in the crypt in the sub-basement (336). (At this point the questioner called the witness's attention to the part of Government Exhibit 33, the written statement, as follows:)

Q. Did you inflict any blows on this lady after you got her in the sub-basement?

A. I did not. The only thing I did was to take my knife out and cut her throat.

I didn't say after I got her down in the basement. He did ask me—I remember him asking me if I drug her any more. I said, "She kept screaming while I had her in the bathroom, and I taken out my knife and stuck her in the throat." I didn't tell the sergeants that I cut her throat after I got her body down in that crypt. The first thing I did was slap her face and I did this because she called me a name and I got angry. The next thing I did after slapping her was to run upstairs and started to run out of the place. I didn't run out because the screaming got on my nerves and something seemed to pull me back (337). Seemed like I couldn't get out of the place.

Q. Have you ever told that to anybody?

A. No.

Q. Ever told that to anybody else?

A. No.

Q. Did you tell that to the doctor?

A. (Witness shakes his head in negative gesture.)

Mr. CURRAN. Ask Dr. Williams to step in here. (Man steps into the room).

By Mr. CURRAN:

Q. Look at that man. Step back please. Didn't you tell Dr. Williams that?

A. Yes; I told him. I thought you meant one of the doctors over at the place there (338).

When I ran up the stairs I had gotten all the way up the stairs practically, and the screaming seemed to have gotten on my nerves. I was in front of the door up at the top of the stairs. I had gotten as far as the door leading out of the library. I don't mean the door that I have a key to. I mean the library door (339). I didn't go right in the library. I didn't stay there very long before I went in. There wasn't no time. I stayed there maybe a minute (340).

Q. What were you thinking of then as you stood there for a minute?

A. I didn't think of anything particular. This hollering kept getting on my nerves. I didn't know what to do. I ran in the library. I saw this pile of wood. I grabbed up the stick, turned around and went back.

I did not tell Scott and Felber that the reason I ran up the stairs was to get the stick and go back and hit her with it. I did not make the statement in Government Exhibit 33: "I smacked her. She ran down the back and started hollering. I had actually gotten mad at that time, and I ran upstairs and got a stick of wood from the fireplace and came back down (340). The door shown in Government Exhibit 2 is the door that I got to when I ran up the stairs, the entrance to the reading room. The room shown in Government Exhibit 3 is the room I entered. I got the stick from the pile of wood there (indicating the pile of wood beside the fireplace). After I got the stick of wood I ran right downstairs. I was running when I came up; I had run up (341). I told Scott and Felber that I ran upstairs and ran downstairs. I started striking her with the stick. I struck her about the head some place. She kept on hollering after I struck her. She was still standing up after I hit her. The stick broke. I saw the broken stick here yesterday. I don't know whether it was the one or not. I never told anybody it was (342). I told Sergeant Scott where I put the stick. I began choking her after the stick broke and she stood there screaming. I choked her because she was still screaming. After I choked her she fainted

and was unconscious. She had stopped screaming. I took her by both hands and started to drag her out (343). I had hold of her fingers in mine. Kind of like that [indicating]. I started to drag her on out. While I was dragging her her ring pulled off in my hand. I continued dragging her into the bathroom where I left her. I got some toilet tissues and went back to clean up those spots of blood that were around on the floor. While she was laying in the lavatory, she regained consciousness and was kind of hollering then. That got on my nerves too and I ran back and choked her again. She kept trying to holler. I taken my knife, stuck her in the throat. She stopped then (344). I did not hear her screaming then at any time. She was not downstairs when I put the knife in her. I stood up after sticking the knife in her throat. I stood up. I noticed the door—thought about that pit down there. While I was taking her down in the bathroom, her dress ran up the chest. I saw her under pants. I thought that would be a good thing to clean up the blood with. I pulled them off. Left her there. I don't know why I put her in the pit. Not to hear her holler again. I didn't try to kill her. I put her in the pit to keep from hearing the noise. She had already stopped, I know. I had clubbed her over the head (345), choked her, stuck a knife in her throat, and she had stopped hollering. I didn't know whether she was dead or alive. I didn't mean to kill her.

Q. You didn't try to do her any good, did you?

A. It wouldn't seem so.

Q. You didn't try to bathe her face or help her in any way?

A. No; I didn't.

Q. Why did you take her down in that crypt?

A. Well, to keep from hearing the noise any more.

Q. As a matter of fact, Fisher, you took her down there to hide her body, didn't you?

A. No; I did not. I wasn't trying to hide her at all. I came back (346), wet the underpants under the spigot, went around and wiped up the spots of blood. I don't know how long it took me to do this.

She brought up the subject of the unsatisfactory way in which I cleaned.

Q. You didn't tell Sergeant Scott and Sergeant Felber that, did you?

A. I don't understand what you mean.

Q. You didn't tell Scott and Felber it was Miss Reardon that brought up the subject of the unsatisfactory cleaning, did you?

A. They didn't ask me who brought up the subject, as I can recall.

Q. You didn't tell them that, did you?

A. I told them that she had started to nail me about not cleaning her desk.

Q. She asked you if you had dusted the desk, didn't she?

A. Yes.

Q. She hadn't said anything about you cleaning under the desk or the comment she had made to the authorities at the cathedral, had she (347)?

A. No; she had not.

Q. You were the one that brought that up, is that right?

A. Yes.

Q. You said, "You are trying to make trouble for me." Is that right?

A. Yes; I asked her if she was trying to make trouble for me.

Q. You were the one who brought up about this complaint she had made; isn't that right?

A. Yes.

She said to me about dusting her desk that morning (348), and it was then I asked her if that was why she had reported me to Mr. Berkeley. She had asked me about dusting her desk. I told her I had dusted her desk. I walker around in front of the desk and told her I had tried to keep the place clean. Then I asked her if that was why she had reported me to Mr. Berkeley because she had seen dust on her desk. She said, no, she had considerable dust on her desk around

the floor. I didn't say as appears in Government Exhibit 33, "When I arrived there the white lady who works in the library was there." I didn't say anything about a white lady at all (349). I did not know her name at that time. I had not referred to her by any name at all in my statement to the police. I did not say to her, "I understand you had a complaint about the floors being dirty." She did say, "Well, I see considerable dirt or dust under my desk" (350). I did not say to the officers, "I told her I could not understand how she could have, although I did not clean the library every day, though I clean it enough to keep the dust down during the time that I am cleaning the books. Then she squawked up and said, 'I don't see why you can't clean it every day cause you are getting paid for that.'" I don't recall whether I ever used the word "squawk"; I might have. I didn't say, "Then she said, 'you black nigger,' and I said, "Wait a minute. I don't like that,' and I ~~smacked~~ her." I left the Cathedral grounds around eleven o'clock (351). I told the police that. I got my coat and hat and went home. I stayed home. I did not notice the blood on my clothes when I left the Cathedral. I first saw the blood on my clothes when I had gone home and had gone to bed. That is when I rolled the clothes up in the sweater and put them in the closet. I pulled off my clothes when I got home, taken everything out of the pockets, threw them up on the smoking stand. I threw the clothes in the closet on the floor. It was not in the back of the closet (352). I did not roll them up at that time. After I had gone to bed and woken up later, I took them out of the closet and rolled them up. I did that because I seemed to have a dream or something about this argument we had. I woke up and thinking of what had happened. I got home at 12:30 or quarter to one. I went to bed because I was tired and sleepy. I don't know whether or not I ~~was exhausted.~~ I was up all night the night before. After I went to sleep I woke up later in the afternoon (353). I looked at the clothes in the closet and then rolled them up. I threw them back in the closet. I came back and sat on the side of the bed. I took the ring and put it in my smoking stand drawer and got back into the

bed. I went back to sleep. My wife got home about eleven. I woke up then. After that I went back to sleep again. I woke up about six or a little earlier next morning (354). I didn't know what to do then. I was thinking over what I had done, and I had a gun at home, and I stuck it in my pocket (355). When I got up that morning I was almost afraid to go up to the Cathedral, because I didn't know what I had done. I had a gun at home. I put it in my pocket and went off to work. When I got off the street car at Wisconsin and Massachusetts Avenues, I walked on up the steps, and I was afraid to go in there (356). I caught the street car and came back over town. I went to the Northeast at that time, and stopped at Twelfth and H Streets, NE., and picked up some groceries, which my wife had asked me to get.

Q. Wait a minute. You went to the Cathedral grounds and put your foot on the first step at Wisconsin Avenue?

A. Yes.

Q. And then you turned around and left; is that correct?

A. Yes, sir.

Q. Was it then that you changed your mind about giving yourself up?

A. I never thought about giving myself up then.

Q. When was it you decided to give yourself up?

A. After I had gone home and got some groceries my wife had asked me to bring. It was late that afternoon when I came from work. I came back over town and stopped by at a garage in Georgetown where I sold my car. When I got the check I cashed it, and then went to Perry's Grill. While I was sitting in Perry's Grill, I thought about that. That is when I couldn't get up nerve to do it.

Q. When you were seated in Perry's Grill, you decided to give yourself up; is that right?

A. That is right (357).

This was quite a long time before the officers arrived. When I left home to go to the Cathedral that morning, I don't know why I took a gun. I was going to use it on myself, like I said.

I didn't do that because I couldn't get nerve enough to do that either. I did not take it because I knew that I had killed Miss Reardon and I knew the police would be after me, because I hadn't thought of that. The reason I pulled the gun out when Sergeant Scott arrested me was because I wanted to get it to use on myself (358). I was not going to use it on the officers. I am left-handed. When I used that stick, I used it with my left hand. I slapped Miss Reardon with my left hand. When I got to headquarters the shorter one of the two men that arrested me struck me in the mouth. The other man, the tall man, kicked me in the side (359). It was then that I said I did it. I did not tell them I removed the ring from her finger. I told them it pulled off her finger. I don't know how Miss Reardon got those scratches on the back of her hand, unless it was by my pulling her by the hands. I cleaned up the blood spots to make the library clean and not because I didn't want anybody to see that blood (360). I never heard any noises before. This is the first time these noises ever bothered me. I am thirty-two years old (361). I did not take Miss Reardon's clothing up in the attic after the killing.

REDIRECT EXAMINATION

I saw Dr. Williams over at the hospital and there was another doctor, a white fellow, who came in to talk with me and examine me (362). The lady whom I now see at the door (Mrs. Astrea S. Campbell) was there too. I have seen Dr. Williams about three times and the white doctor once or twice. I saw Mrs. Campbell once.

Mr. HOUSTON. That is all.

The COURT. May I ask a question?

Mr. HOUSTON. Certainly.

The COURT. Did I understand you to say that after you smacked Miss Reardon you went upstairs?

The WITNESS. Yes, I ran upstairs.

The COURT. To the main floor?

The WITNESS. Yes.

The COURT. Did you say you stood out in the hall?

The WITNESS. No, I didn't say that. I kept moving slowly. The noise got on my nerves.

The COURT. I don't want to confuse you. Did you stand in the hall and listen to her?

The WITNESS. No, I didn't stop to listen to anything (363). I was moving all the time, but the noise kept seeming to be pulling me back.

The COURT. You mean you were moving back and forth?

The WITNESS. No, just moving towards the door to get out.

The COURT. Towards the door?

The WITNESS. Yes.

The COURT. And did you get to the door?

The WITNESS. I didn't get close to the door at all. I got to the Library door first, and it seemed that the noise got so loud I ran into the library and grabbed the stick of wood.

The COURT. How long did you stay in the library?

The WITNESS. How long did I stay in the library?

The COURT. Yes.

The WITNESS. I didn't stand there at all. I kept moving all the time.

The COURT. Moving which way?

The WITNESS. I ran into the library and got the stick of wood, and ran right back downstairs.

RECROSS-EXAMINATION

By Mr. CURRAN:

Q. At what point was it that you were moving slowly (364)? You said you were moving slowly.

A. Coming up around the stairs, near the top of the steps.

Q. You did not run up, then?

A. I was running up the stairs, yes, but the noise seemed to get so bad, I slowed up gradually, pulling myself out.

Q. Didn't you testify in response to a question that I asked you that you stopped at the door leading into the reading room of the library, and I asked you——

A. You didn't understand what I meant. I meant that I kept moving, but I did not stop to think about anything.

Mr. CURRAN. That is all.

Mr. HOUSTON. That is all. Step down.

Thereupon Astrea S. Campbell, being first duly sworn testified for the defendant as follows: My address is 539 Florida Avenue, NW. (365). I am clinical psychologist in the Division of Pediatrics at Howard University. I have a Master of Science with a major in psychology. I have done further graduate study in psychology at Howard University and the Catholic University in Washington. I served as an intern at New York State Training School for Boys, at Warwick, New York. I have the New York State certificate for psychological testing. I have contributed to the American Journal of Psychology. On Saturday, June 24, 1944, I went to the District Jail to make an intelligence quotient or psychological test on Julius Fisher (366). His I. Q. is 76. According to determined scaled, 76 falls in the class of borderline deficiency. I gave him the revised Stanford-Benet form, which has been revised by Terman and Merrill, the 1937 revision: Stanford and Benet were French psychologists. Terman and Maude Merrill are American scholars. I have here the actual test papers that were used on Fisher and a sample form of the test (367). In administering the form "L" test, I begin with the vocabulary and see how many words the subject can define, even though they may be words he could not read in print. That is the way I began with him. I found his score on the vocabulary was 17. This is very good for a person with a borderline deficiency. Usually from the vocabulary you can get an idea where to begin the test, but I found that he had only finished the second grade in school and had not completed the third, so I began with the eleventh year of the test, where the vocabulary is 14 (368). I found he could complete only two of the phases of the test there, which gave him a score of four months. That was the twelfth year. I went to the eleventh year and found he could only complete six months mental age on that. I went back until I got to the tenth year, and that was what I found to be the base year, or the year in which he completed

every phase of the test successfully. From there I went to his final range and his final range was 14 (369). (Thereupon the witness explained in detail the tests given the defendant and the results.) The next of the phases is the average adult. On this he scored nothing. Adding all this together I secured a mental age of eleven years, four months. The entire test was given (370–373). The subject was extremely serious and very cooperative. His responses were thoughtfully and slowly given. In one instance, almost double the allotted time was consumed by the subject in arriving at the correct result. In no phase of the test above the basal age which required immediate recall did he score. This lack of immediate memory, lack of ability to plan logically, plus his inability to read the required parts of the test, were his greatest weaknesses. The chronological age of thirty-two years, two months, mental age of eleven years, four months, and I. Q. of 76, placed him in the borderline deficiency group (374).

CROSS-EXAMINATION

Fisher's finding is based on the 16-year standard that the average adult matures at sixteen years (376). Benet and Stanford standarized the test for the French people. It was adapted for English-speaking people by Terman. The manner by which the intelligence of the person is arrived at, is his ability to acquire information up to a certain age. This system was applied to French persons from childhood up to sixteen years (377). The test is not supposed to measure schooling exclusively (378), but to a certain extent schooling is so necessarily involved that the result of the test would be unfavorable to one who had not gone to school (379). His answers were never very prompt even in the ages which were within his grasp. I excluded one answer because it was over the time limit (380). (Thereupon the witness was questioned by the Court:) I did explain to the defendant why I wished to ask these questions (382). The cental age of eleven years, four months, means the mentality of an average child of the chronological age of eleven years, four months. I did not *aks* the subject anything about his working career. The test did not call for any inquiry as to his working and earning a living.

I did not depart from the written questions in any way (383). The ability of a man to work successfully in employment and make a living over the course of years would in nowise influence the conclusions of the test because the test is standardized. The fact that he had successfully carried on the work of a chauffeur and butler in the home of an Army officer, and for some three years had worked successfully for a chemical company, would in no wise influence the conclusions to be drawn from the test (384).

The COURT. Could a child of 11 years and 4 months, the average child of 11 years and 4 months—would he have the mental capacity to successfully carry on employment as a chauffeur and butler in a home?

The WITNESS. According to the standards, a child of 11 years and 4 months, since there is absolutely nothing skilled about it and it is a regular routine matter, according to the test, he would be able to do that.

The COURT. According to this test which is laid down, the average child of 11 years and 4 months would have the mental capacity to successfully carry on the employment of a chauffeur and butler in a home; is that correct?

Mr. HOUSTON. If your Honor please, I do not think those questions are exactly fair.

The COURT. If it isn't, make an objection.

Mr. HOUSTON. All right; I object, your Honor.

The COURT. What would be the ground?

Mr. HOUSTON. I think this: You might have the mental capacity, but not the physical capacity.

The COURT. I am asking about the mental capacity. * * * I am overruling your object.

Mr. HOUSTON. I understand. Exception. I do not believe she has answered the question (385).

(Here followed a discussion between the Court and counsel for the defendant, in which counsel for the defendant stated that inasmuch as the Court had overruled the objection, the pending question should stand and the witness have a full opportunity to answer it) (386–387).

The COURT. In order that there will be no misunderstanding about it, I will put the question again.

In your opinion, drawn from the nature of the test given, developing an age of 11 years and 4 months as to mental capacity, would a child with the average mentality of the age of 11 years and 4 months be mentally capable of carrying on employment as a chauffeur and butler in a home?

The WITNESS. You wish my personal opinion?

The COURT. I wish your expert opinion (387).

The WITNESS. Well, according to Terman, an adult who maintains a mental age between 8 and 12 years, is really considered on the borderline of feebleminded——

The COURT. You do not quite answer my question. Is that the only answer you wish to give?

The WITNESS. Yes; that is.

The COURT. Then again, in your opinion, would a child of 11 years and 4 months have the mental capacity to carry on the general work in the disinfecting of rooms and houses, and places of that sort?

The WITNESS. Is that my opinion you are asking for?

The COURT. Yes.

The WITNESS. I don't think so (388).

REDIRECT EXAMINATION

I don't know whether a grown person of a mental age of eleven years and four months could hold a job as a butler and chauffeur. I believe he could be assigned to do work as an exterminator, going around and disinfecting closets in homes and things like that, just routine work with no actual skill required.

Thereupon Ernest Y. Williams, being first duly sworn, testified on behalf of the defendant as follows: My address is 1747 First Street, NW. (389), and I was graduated from Howard University in 1930. I had one year at Columbia University, and one year between Cornell University and New York University Medical School. My field is neurology and psychiatry and I am a member of the faculty of Howard Univers[illegible] Medi-

cal School, and in charge of neurology at Freedmen's Hospital

I examined Julius Fisher on four different occasions; the first on June 22, 1944 (390). He said the night before he had been out all night and had been drinking wines, beers, and a few mixed drinks, at two or three different places. This was in the northwest part of the city. He said he stayed with some friends for the rest of the night, and in the morning he went back to work. He doesn't know the exact time he went back to work, nor the exact time he went to see his friends. He stated also that he got to work a little later than usual. The next morning he said he had what he calls, and what the average alcoholic calls, a hang-over, in which he said he felt dull, had a stomach ache, felt badly, felt tired, and a little sleepy. He said he had to work between seven and eleven on that particular day and he had only a few hours to work and that he thought he would be able to make it (391). He described his job and spoke of his conversation with a woman at the library. He said she called him "a black nigger." He swelled up inside and felt a fullness in his chest and reached over and slapped her. He said that no one else had ever called him that before. After a second he walked away and decided to go home. As she saw him go up the stairs, he said she ran across to a window and started screaming at the top of her voice (392). He said that the noise got the better of him, and instead of going home, as he started to do, he started back and took a piece of wood from the fire hearth and struck her with it, with the idea of quelling the noise. (The witness then related how the defendant described the choking and killing and dragging of the body substantially as the defendant had testified.) I asked him why he had cleaned up the blood and he said, "I was trying to make the library look clean," because that was his job (393). I asked him what bothered him mostly and he said it was the noise she kept on making. (The witness then repeated what the defendant had related to him as to the occurrence after he left the body in the crypt substantially as the defendant had testified) (394).

He got as far as the second grade, when he got into the third grade he left school, at the age of fourteen. In other words it took him six or seven years to go from the first to the second

grade (395). At about the time when he was about to be inducted into the Army he found that he had spyhilis. He did not recall when he contracted this disease. He said he did not report for private treatment as directed, because he felt all right and the only time he felt badly was after drinking. He had held numerous jobs most of which paid very small salaries, some $20.00, $25.00 and $35.00 a month, as chauffeur, butler and sometimes cook. He said he couldn't read and had to take what they gave him (396). He said that he had started drinking alcohol at about the age of sixtee or seventeen, some twelve or fourteen years ago. (At this point, the Court called counsel to the bench and stated that much of the testimony being given was not admissible; and that an expert opinion must be based upon facts as to which there is evidence in the case (397). Counsel for the government stated that while some of the testimony was foreign to the evidence, they were not disposed to object to the manner of the witness' testimony if the remainder of it be kept confined substantially within the limits of the evidence (400). During the course of the discussion, counsel for the defendant expressed some concern that the jury might have been impressed unfavorably against the defendant by reason of the Court's action in calling counsel to the bench. The Court suggested that he would instruct the jury to draw no unfavorable inferences, if counsel wished it. Counsel for the defendant stated he did wish it, and thereupon the Court instructed the jury satisfactorily in that regard (401-403). When the defendant worked for the chemical company, he drank heavier than at other times. While on his job at the Cathedral he also drank periodically. On such occasions he said he always refrained from going to work the next day (405). On examination I discovered that the pupil of Fisher's left eye was very sluggish and slightly irregular. Both pupils, however, reacted to light.

There was a ptotic condition, at the external canthus of both eyes, giving the eyes a sort of mongoloid expression, known as Veiaguth's fold, found quite frequently in constitutional defects in which the individual is subjected to marked depression. His reflexes were found to be hyperactive. There

was a marked hyperextension of both big toes, especially the right one. There were slight tremors of his fingers. His blood pressure was 124/60 (406). A spinal tap was done. The pressure was found to be 280 millimeters of water. The upper limt of normal. There were only six cells in the fluid. Up to the present time we have not been able to get the report back. I gave him several simple stories and he was unable to retain the details (409). I next gave him the Zinsen's test which is to make comparison between simple facts. He failed this. I then gave him the Fink test in which he was given certain ordinary statements to see whether he knew anything about them. He failed this test (409). In addition there was a flattening of his emotional response to situations: a more or less apathetic reaction to emotional situations. His memory was found to be good. In summary, the pertinent factors brought out by the examination were these: history of dipsomania, chronic alcoholism, over a period of fourteen years, with several arrests; evidence of introversion; lack of aggressiveness prior to drinking which was definitely sublimated on drinking (410); a history of exaggerated reflexes (411); a flattening of effect; Veiaguth's fold. Psychiatric examination showed a limitation of information, judgment and comprehension (412). I think this man shows definitely evidence of what I call a psychopathic personality, and that the alcoholism is but a symptom of the total picture (414). This picture, so far as the psychopathic personality is concerned, shows the predominantly aggressive type of behavior (415), purely of an impulsive nature (416). The fact his memory is good is characteristic of the type of reaction one gets in an aggressive type of psychopath.

The speech center in the brain in a right-handed individual is on the left side of the brain, lower portion of area six in Brodman's classification. Two blows on the right hand side of the skull, fracturing the skull over considerable area, in a right-handed individual, would not necessarily immediately paralyze the area of the brain controlling speech, but it would paralyze the legs. The control of the leg area is in the top of the brain (417).

CROSS-EXAMINATION

I can not answer "yes" or "no" whether Fisher was of unsound mind at the time he killed Catherine Reardon. I doubt whether he had the ability to distinguish between right and wrong, but I can not answer the question categorically (418). The question depends on impulsive forces under which the individual acts as to whether he has the chance of making the decision between right and wrong (419). I think he was unable to resist the impulse to kill her by reason of a deranged mental condition (420). I doubt whether he was able to entertain an intent to kill her. His inability to entertain that intent was partly due to a deranged mental condition. It is very hard to divorce a mental condition from an emotional condition. I think there is a summation of effect. I can not say it was due to an emotional condition (421), it was due mostly to a mental condition. You have here a psychopathic personality associated with chronic alcoholism and with early schizoic tendencies (422). They are three diseases: a psychopathic personality, chronic alcoholism, early schizoic tendencies. Chronic alcoholism could be evidence of a psychosis. It is not a mental disease in itself. Schizoic tendency is a mental disease (423). A person with a psychopathic personality is a borderline case. A psychotic person is a person of unsound mind. A psychopathic personality in itself could be evidence of a psychosis; it might be a symptom of a psychotic person (424). Schizoic means a splitting of the personality where the emotional life gradually twists from the normal pattern giving you a schizoic pattern of behavior (425). A schizoic person is both a sane person and an insane person at different times (426). At the time Fisher killed Miss Reardon he had all the elements of an insane person. He definitely showed signs of impulsive or uncontrollable urge. I don't think he was sane when he killed Miss Reardon (427). I can not answer whether Fisher was sane or insane when he killed Miss Reardon by categorical answer "yes" or "no" (428).

Thereupon Mrs. Gertrude Adams was called as a witness for the defense and being first duly sworn, testified as follows: I have lived at 4802 Hayes Street, Northeast about 18 years.

Fisher lives at 4806 Hayes Street, Northeast, two doors from my house. The community is generally a home-owning community. I am well-aquainted with the people there. Fisher's reputation among those people for peace and good order is very, very good (428).

Thereupon Canon Theodore O. Wedel was called as a witness on behalf of the defendant and being first duly sworn, testified as follows: I am Canon at the Washington Cathedral. I knew Miss Catherine Reardon quite well a little over five years. I know the defendant Julius Fisher by sight. In December 1943, shortly after Fisher came to work, Miss Reardon spoke to me about work in the library (429). The court sustained the government's objection to the witness' relating what Miss Reardon told him under the following circumstances:

> Mr. HOUSTON. She did complain to Berkeley about not cleaning, and complained to the Canon about cleaning too much.
>
> The COURT. I think that is immaterial. The question is, what was in the mind of the defendant.
>
> Mr. HOUSTON. On the probability of whether his story is true, I think it is important, as to whether his story is true. He is the only person, it is true, in the quarrel with Miss Reardon. As to Miss Reardon's personality, I say this is important in that respect of bringing out the probability of Miss Reardon's being a woman who was hard to satisfy. Miss Reardon said at the outset when he first came there, he was cleaning up too much. She asked the Canon to have Mr. Berkeley tell him not to clean every day.
>
> The COURT. You don't intend to mean that information was conveyed to the defendant, that he knew anything about it.
>
> Mr. HOUSTON. No.
>
> The COURT. Are you objecting?
>
> Mr. MURRAY. Yes.
>
> The COURT. Objection sustained.

The witness was thereupon excused.

It was then stipulated of record by counsel for government and for the defendant that Fisher had sold his automobile on March 2, and had received in payment therefor $25.00 (431).

Thereupon the defendant rested his case.

Immediately the government called in rebuttal Dr. Edgar D. Griffin who first being duly sworn testified as follows: I am senior medical officer at St. Elizabeth's Hospital. I have been at St. Elizabeth's Hospital approximately 14 years. I graduated from George Washington University (432). I have also been associated with several universities. I am at present associate in psychiatry at George Washington University; associate professor of psychiatry at Catholic University. I have also been a lecturer in abnormal psychology at Maryland University. I am a Diplomate of the American Board of Psychiatry and Neurology and a member of the American Psychiatric Association. I have been an examining psychiatrist at the Fort Myer induction station and am the psychiatrist of the Medical Advisory Board B of the Selective Service. I have read all the defendant's testimony as of yesterday. I was in the courtroom today until about 11:22 (433) and heard most of the cross-examination of the defendant. I returned to the courtroom about 11:38 when the psychologist was on the stand. I heard most of her testimony and all the rest of the testimony up to the present time. I have heard nothing, read nothing about the case which would lead me to believe that the defendant was of unsound mind. I haven't examined the defendant and would not want to say definitely whether he was of sound or unsound mind (434). A psychopathic personality is a person of unsound mind. A person who just shows schizoic tendencies is a person of sound mind. Schizoia is a term synonymous with introversion or introverts (435). Most of the philosophers of the world are introverts. In fact, about fifty per cent of all normal people have a schizoid personality. Schizoid is not synonymous with schizophrenic which is a term usually applied to a mental condition. Schizophrenia is a term used by many psychiatrists as a synonym of dementia praecox, but the terms schizoid tendencies and schizophrenia or schizophrenic tendencies should not be confused. In all probability if you have a person who has been termed a psychopathic per-

sonality associated with chronic alcoholism he is of sound mind (436).

CROSS-EXAMINATION

Whether persons otherwise normal might be led by irresistible impulses to commit certain acts of violence toward other people would depend entirely upon the circumstances and even then it would be a question whether the individual was of sound or unsound mind. In a conflagration like the Cocoanut Grove fire where there is a panic and people are trying to get out piling up over one entrance which is blocked, the frenzy of getting out might lead even a normal person to trample on other people in his way (437), but that would not necessarily mean such a person was of unsound mind. It would be a fear impulse. Many people are frequently driven by fear to commit actions they would not commit if the impulse of fear were removed (438).

The COURT. Doctor, I didn't quite understand, from the knowledge you have of this case—your knowledge came from the testimony of the defendant and the early testimony which you have heard—have you any conclusions as to whether or not the defendant at the time of the killing was mentally capable of understanding the nature and quality of his acts?

The WITNESS. I believe so.

The COURT. Was he capable, if you can answer, of knowing that it was wrong? In other words, was he mentally capable of understanding that the act of killing a human being was wrong?

The WITNESS. I had no reason to believe he didn't have that power of thinking the thing through, making that determination from what I know of the case.

The COURT. Is there anything in the testimony as you know it, to indicate that he was suffering from a disease of the brain or a disorder of the brain or other mental faculties?

The WITNESS. The only thing that I heard that would indicate some abnormality was the evidence concerning his mental age which would show that intellectually he

> was not normal, but yet had such a degree of intellectual ability that I think that he was criminally responsible. In other words, the phychologist testified that he had a mental age of eleven years and four months. It is usually accepted that an individual who has that degree of intellectual ability is able to think very nearly as well as a normal person. In other words, they have nearly 80% of intellectual ability (438-9).

I heard which would indicate some abnormality was the evidence concerning his mental age which would show that intellectually he was not normal but yet had such a degree of intellectual ability that I think that he was criminally responsible. In other words, the psychologist testified that he had a mental age of eleven years and four months. It is usually accepted that an individual who has that degree of intellectual ability is able to think very nearly as well as a normal person. In other words, they have nearly 80% of intellectual ability (439).

Thereafter the defendant resumed cross-examination of the witness and the witness testified as follows: I do not think that Fisher was set off by automatic impulses; I think probably he was very mad and there was provocation. He might easily have acted under anger without being mentally diseased. I am dealing in probability. An uncontrollable urge is not a sign of any mental condition. A person with a psychosis could have that irresistible urge, so also a psychotic person; by that I mean a mental illness superimposed upon the basic personality, psychopathic personality (442).

REDIRECT EXAMINATION

The psychologist, Mrs. Campbell, used the basal age of 16. The basal age differs with different psychologists. The usually accepted basal ages are anywhere from 14 to 16, 14, 15 or 16. If the basal age for Fisher had been 15, the test would have resulted 80 plus a little (443). If the basal age of 14 instead of 16 had been used, Fisher's score would have been 80 plus. An I. Q. of 80 means the individual has 80% of normal intelligence.

Sixteen is very frequently used as a basal age.

The government then rested its case. The defense announced it rested (444). The court recessed at 3:50 o'clock p. m., Wednesday, June 28, 1944, until 10 o'clock a. m., Thursday, June 29, 1944 (445).

On Thursday, June 29, 1944, when the court convened, the Court addressed the jury as follows:

> The COURT. Ladies and gentlemen, an unforeseen situation came about for which no one was responsible, and has necessarily caused this delay. The result is that although the case was formally closed by counsel on both sides yesterday, it is deemed by all counsel, and in which I concur that it should be reopened for the purpose of taking evidence on a certain and particular point. We will now proceed with that evidence (447).

Whereupon, Dr. Egbert Vincent Wiltshire was called as a witness for the defendant and being first duly sworn testified as follows: I am a graduate of Howard University Medical School, 1943 (448). At present, I am a resident in internal medicine at Freedman's Hospital. On June 24, I went with Dr. E. Y. Williams to the District Jail to perform a spinal puncture on Julius Fisher. Present were Dr. Williams, the District physician, and a Dr. Ammerman, psychiatrist from St. Elizabeths. It was my impression that Dr. Ammerman was representing the District Attorney's office. I did the spinal puncture. Three samples were taken. One was given to Dr. Ammerman (449) and I took two tubes to Freedman's Hospital. There was a continuous flow from the spinal column fluid into the three different tubes. I got to Freedman's Hospital about 6 p. m. on Saturday. The laboratory was closed. I labelled the two tubes properly and put them in the ice box in the chemical laboratory. On Sunday morning about 10:30 a. m., June 25, I did a Pandy test to determine whether there was any protein or disturbance particularly in the cells of the fluid. I did a cell count. The cell count showed sixteen cubic millimeters (450). I spoke to Dr. Williams on the

telephone and told him 16 cells. If Dr. Williams made a statement "6 cells" he probably misunderstood me—what I said over the telephone. I personally found 16 cells. That represents that there was some process going on in the spinal column which had irritated the spinal column and there was an increase in the cells. That is nature's defensive mechanism to take care of that particular infectious process. Six cells are just at the range where you can determine the maximum of normality or the beginning of abnormality. The presence of 16 cells is abnormal. The next contact I had with the specimen was Monday morning, June 26, about 8 a. m. (451). One of the specimens was taken to the Serology and Dermatology Laboratory, and from there was sent to the District Health Department for a Wasserman test. The second specimen was placed in our laboratory to be done by our medical technician. I got a report that some blood cells were found. Our laboratory was not able to run the test (452).

CROSS-EXAMINATION

There were 16 cells but the type of cells was not determined. They were white blood cells but I do not know whether they were lymphocytes or granulocytes (453).

Thereupon, Jesse P. Porch was called as a witness for the defendant and being first duly sworn testified as follows: I am serologist for the District Health Department; have been for about 20 years. The District Health Department runs serological tests for Freedman's Hospital. On Monday, June 26, I received a specimen of spinal fluid labelled Julius Fisher, District Jail (454). I made a complement fixation test as one of the symptoms of syphilis. The test was positive. Thereupon the original record showing the results of the test was introduced as defendant's exhibit No. 3 (455). We made titration test on spinal fluid starting with one cubic centimeter. One cubic centimeter was positive, 4-plus (456). The 4-plus indicates a strong positive reaction and is a sympton of syphilis, or some other disease. There are other diseases that will cause a positive complement fixation test. Then we made smaller dilutions, eight-tenths of one cubic centimeter which

also gave us positive. Six-tenths, four-tenths, and two-tenths of a cubic centimeter. All were positive. Two-tenths of one cubic centimeter is usually the highest dilution we make of such a sample. I have been using this test for 25 years (457). I am a veterinarian. The test is recognized as a reliable test to determine the positive reaction of the specimen. I completed the test yesterday afternoon. Our routine takes us about 48 hours. I was making the test from June 26 until June 28.

CROSS-EXAMINATION

From the appearance of the fluid, there was no blood (458). There is a more exact test to determine the presence of blood. I did not know that this defendant's blood was syphilitic until later. The collodial gold test is one of the tests for the reaction of syphilis. I did not apply that test in this case.

Thereupon the defense introduced as Defendant's Exhibit No. 4, the record from the D. C. Public Health Clinic at Delaware Avenue and I Streets, Southwest, giving Fisher's clinical record of syphilis in the blood stream and showing treatment for it (459). The records of the Health Clinic were opened November 23, 1942, and showed treatment from November 30, 1942, to October 25, 1943, at which time Fisher was transferred to a private physician, Dr. Thornton, at 2832 Dean Avenue, Northeast (460).

Thereupon Dr. Ernest Y. Williams was recalled to the stand as a witness for the defendant and already having been previously sworn, testified as follows: I have heard Dr. Porch's testimony about the test he ran and the results confirm the earlier findings I made which showed that this man had exaggerated reflexes (461), a positive Babinski, an evidence of organic disease of the brain. Secondly, Fisher had one pupil very sluggish and slightly irregular as far as the outline was concerned, which is also an evidence of syphilis. I think in the absence of a colloidal gold test which is very necessary to say that he was suffering from paresis, the only other evidence one could give was that this man had early neuro-syphilis. Neuro-syphilis is a term used meaning not only that the brain structure is involved, but also that there is parenchyma of the

brain as well. An absence of a positive finding in a test would not rule out the existence of neuro-syphilis. About 70% of the cases will give a positive test but about 30% will sometimes give a negative test (462). The presence of a positive finding would establish neuro-syphilis. The disease neuro-syphilis would have highly suggestive value in determining whether or not the defendant was of unsound mind (463).

CROSS-EXAMINATION

On cross-examination the government first read to Dr. Williams to refresh his recollection part of his previous testimony where he had said the fourth factor was the history of exaggerated reflexes; that the spinal fluid report had not been received and therefore he could not very well determine whether or not the exaggerated reflexes and suggestions of a Babinski on the right was due to chronic alcoholism or to Lues or whether it was a concomitant finding (464).

The witness then stated his former testimony was true. Lues is syphilis. The significance of the spinal test was that if it turned out to be positive, it would mean the exaggerated reflexes could be caused by alcoholism, by syphilis, or both. I know there was syphilis in Fisher's blood. It was possible for blood to get into the spinal fluid (464) but clinically we could not see any evidence of it. All three samples taken from Fisher's spinal column fluid were clear. It is possible for blood to get into the fluid from the spine in extracting the fluid (465). I do not know what steps Doctor Porch took to determine whether there was blood in the particular fluid he analyzed. I would not say that a small percentage of syphilitics are affected in the brain. There is a small percentage of such persons who go to insane asylums (466). I am not sure that the particular fluid that went to Freedmen's Hospital laboratory for analysis had blood in it.

REDIRECT EXAMINATION

I did not perform any of the tests at Freedman's nor was I present. I have not talked directly with the laboratory technician who performed the test (467). With a mild dilution of

two-tenths of a cubic centimeter, a positive finding of 4-plus in the spinal fluid would be strongly evidence of the existence of neuro-syphilis. Neuro-syphilis would furnish a broad clinical basis for the findings I have made.

RECROSS EXAMINATION

I don't think Fisher has paresis.

Thereupon, the defense rested.

In further rebuttal, the government called VERNAL MARIE WALSTON, who being first duly sworn testified as follows: I am a medical technician at Gallinger Hospital (468). I have tested spinal fluid for syphilis there. I have worked at Gallinger and for two years and seven months of this time I have done the serological work. I would say I have done approximately 2,000 tests. On Saturday, I examined the tube marked "Julius Fisher." We did the Kahn test which was negative. The Kahn test is used to indicate whether the person has syphilis of the central nervous system. I also did the colloidal gold test (469). This test was negative. I also did a test for the protein content of the spinal fluid which was 30 milligrams per 100 cubic centimeter of fluid. That is a negative result. In the colloidal gold test, the fluid is diluted ten different dilutions, each dilution twice as strong as the one next to it. The tenth dilution in this case was negative as well as the first and all intervening ones. I made the report in Government Exhibit No. 35, which the Government thereupon introduced in evidence as the record of the test made at Gallinger Hospital on the spinal fluid of Julius Fisher testified to above (470).

CROSS-EXAMINATION

I am not a doctor. I have worked under the supervision of Dr. Connerty, who is the pathologist at Gallinger Hospital for a period of two years. Before that, I worked in a doctor's office and did laboratory work. He was Dr. Hardy, a general practioner. I was with him two years. I had had no training in doing these tests before I went to him. At Gallinger I have worked under very direct supervision (471).

I have had two years of college training. I took a scientific course. I had a course in clinical laboratory procedures when

I was in college. It did not include blood tests and things like that. No one checked my findings on these tests made on Fisher. I did not do the tests on Saturday. I think it was Monday. I cannot remember who gave me the specimen (472). The specimen was properly labeled. I think it may have been with the other specimens. They are not handed to me by anyone in particular. I get them from the container. I left the laboratory on Saturday about 4:30. I don't know whether the specimen had been delivered to Gallinger at the time I left. I did not test the specimen for blood. It did not appear to have any. The fluid was setting from the time it was taken up until about Monday when I ran my test. The Kahn test takes two or three hours (473). The colloidal gold test, 24 hours. I ran the colloidal gold test Tuesday morning, began the test Monday morning to the best of my knowledge. I am not in charge of the laboratory. Dr. Connerty is in charge of the laboratory. He did not verify my findings.

REDIRECT-EXAMINATION

I did not see any blood in the specimen. There was not enough syphilitic blood in the specimen to make the test positive. (474.)

Thereupon Edgar D. Griffin was recalled as a witness for the United States and already having been previously sworn testified further as follows: If there is a suspicion that a subject has syphilis, and a further suspicion that the subject has syphilis of the central nervous system, certain serological tests are made, the main one being a spinal fluid test. Spinal fluid is that fluid which flows about the brain as well as the spinal cord and acts as a cushion or a shock absorber to keep the brain and cord from damage. Very often from the examination of that fluid, certain information can be obtained which will assist the doctor in making diagnosis. Of course, all laboratory procedures are merely confirmatory (475). They help to confirm the clinical findings.

In spyhilis, certain tests have much greater weight than others. Of course, the doctor would want to know whether or not the spinal fluid shows a positive reaction for syphilis. The most common test is the Kahn reaction, which is a positive

test for the reaction of that fluid. He would want to know also how many cells are in the fluid, the degree of protein content, and would want to know about a very highly specialized test called the colloidal gold test, so as to determine what type of disease is probable. In paresis, which is one of the more common forms of disturbances of the central nervous system caused by syphilis and which causes also unsoundness of mind, the colloidal gold test is used to show what type of central nervous system syphilis is involved. A certain type of curve, obtained by these ten dilutions will indicate that the victim is suffering from paresis (476). Another type of curve might indicate he is suffering from other types of central nervous system syphilis. In a normal person you get what you call a flat curve, where in all of the dilutions a zero is obtained, or perhaps only a strength of one. In the positive Wasserman reaction, it may indicate early involvement of the central nervous system. Such an early involvement that very few symptoms are produced on the clinical side of the picture. A negative result of the colloidal gold test would indicate in all probability the individual did not have the most common form of central nervous system involvement, general paresis. It would probably indicate too, that there was no serious form of what is known as cerebral syphilis, where the blood vessels of the brain are involved, and as a result of the damage to the brain, to the blood vessels, certain areas of the nervous tissue are deprived of blood and therefore damaged. The negative result would mean that there was very little damage to the brain by syphilis (477). Assuming the test by Dr. Porch to be correct in a positive reaction, one isolated finding wouldn't be very weighty in itself. You should have these other collateral tests. Furthermore, it is important to know whether the fluid has been contaminated with syphilitic blood in the actual procedure of drawing the fluid.

CROSS-EXAMINATION

If the fluid were contaminated by blood in the process of drawing it, this would show up in the Kahn test. In general practice, if a spinal fluid is contaminated with blood, it should be rejected and not examined at all. It would show up in the colloidal gold test. It would depend upon the degree of the

contamination. The Kahn test would require a specialized knowledge in order for one to perform it. Likewise the colloidal gold test (478). It would require special skill and knowledge. If a person committed errors in skill or did not have the specialized knowledge that might affect the accuracy of the test. If the test were negative what it would mean would depend largely upon what disease was suspected. A negative result would rule out the disease of the parenchyma, the nervous tissue itself, but not necessarily if the blood vessels only of the brain were involved. There might be some involvement even though the test were completely negative.

Thereupon the Government announced the end of its rebuttal (479). With the permission of the Court, the defense then pointed out certain items to the jury. It is agreed and stipulated of record that February 29, was payday at the Cathedral and that Fisher had been paid that date (480). It was further stipulated that Mrs. Campbell actually used the year 15 as the basal age in computing her intelligence test so that she had 180 (or twelve months time 15) dividing his score of 136, so that her intelligence quotient of 76.1% was on the basis of 15 years basal age (481).

Before the arguments to the jury were begun, the defendant offered eight prayers for instruction to the jury numbered 1 to 8 inclusive. Prayers 1, 2, 4, 7 and 8 were read to the jury by counsel for the defendant during his argument (537; 544; 505; 535; 504). Prayer No. 5 was not read but the Court instructed fully on the subject of good character evidence to which it related (567). Prayer No. 3 was withdrawn and the subject matter of it was adequately and correctly treated in the instruction (565–6). Prayer No. 6 was as follows:

> The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case.

Prayer No. 6 was denied and to its denial an exception was taken.

Thereupon, Mr. Murray, the Assistant United States Attorney made the opening argument to the jury on behalf of the United States in which, among other things, he stressed the conflict between the testimony of the police and the testimony of the defendant (482–502).

Thereupon the defendant's counsel addressed the jury on behalf of the defendant (502–545), in the course of which he challenged the accuracy of the written confession taken by the police, and the accuracy of the testimony of the police.

Thereupon the United States Attorney made the closing argument on behalf of the Government (545–556) in the course of which, among other things, he dwelt upon the conflict of testimony of the police and the testimony of the defendant.

Thereafter the Court charged the jury as follows (556–569):

> The indictment contains six counts, each charging in varying ways the crime of murder in the first degree, doubtless so drawn to meet the proof, as developed at the trial.
>
> The Government now elects to submit the case upon the first and second counts. You will, therefore, disregard the others. Both remaining counts allege that on the 1st day of March 1944, in the District of Columbia, the defendant, Julius Fisher, contriving and intending to kill Catherine Cooper Reardon, purposely and of his deliberate and premediated malice, did kill her.
>
> The counts vary only in this respect: The first alleges the killing to have been done by choking, and strangling; the second by striking and beating with a stick.
>
> Finally, it will be your duty to determine whether or not the defendant is guilty, and if so, the particular count upon which his guilt is found.
>
> The grave nature of the charge must impress you with the importance of a just solution both as it affects the public interest on the one hand and those of the defendant on the other.

You are conscious, I am sure, of the solemn duty to decide the case fairly without sympathy or prejudice. As experienced jurors, you understand that you are the sole judges of the facts; also that the Court is the sole judge of the law of a case, and that it is the duty of the jury to accept the law as laid down by the judge, and fairly apply it in their deliberations and conclusions.

Certain written instructions read by counsel for the defendant were approved by the Court, and you will accept them as correct statements of the law.

There are certain general principles governing the trial of criminal cases about which I must remind you.

The indictment itself is but the formal accusation of the crime with which the defendant is charged. It is the chart by which the trial proceeds to its culmination. It is no evidence of guilt, nor is the action of the Grand Jury in returning the indictment any proof of guilt. On the contrary, the defendant at the outset of the trial is presumed to be innocent, and that presumption prevails throughout the course of the trial until and unless, in your final deliberations, you find him to be guilty beyond a reasonable doubt.

This casts the burden of proving guilt upon the Government. It imposes the burden of proving that guilt beyond a reasonable doubt.

A reasonable doubt, as the words clearly indicate, is a doubt based upon reason which arises out of the evidence or the lack of evidence in the case. It is such a doubt as after a full and fair consideration of all of the evidence, will leave a juror's mind so undecided as that he does not have an abiding conviction of the defendant's guilt: That is, a settled conviction of guilt which he believes will remain unshaken by future thought and reflection. It is such a doubt as would cause a reasonably thoughtful and prudent man to hesitate to act through feelings of uncertainty if confronted with a question of importance concerning his own affairs.

A reasonable doubt does not arise from mere conjecture, whim, or caprice, nor from reluctance to convict through feelings of sympathy or mercy. It is a conscientious belief arising after calm, dispassionate and impartial consideration, that there is reason to doubt the defendant's guilt.

But the requirement for proof of guilt beyond a reasonable doubt, does not imply proof beyond all doubt. Happenings between human beings cannot usually be proven to an absolute certainty, hence the law does not require it. Yet, as a fair shield of protection, it does provide that one accused of crime shall not suffer the loss of his good name, his liberty, or life, unless proven guilty beyond a reasonable doubt.

Although the indictment specifically charges murder in the first degree, it does contain within its allegations the lesser degrees of unlawful homicide; namely, murder in the second degree, and manslaughter. The indictment, therefore presents the question whether the defendant is guilty; and if so, the particular degree of unlawful homicide of which he is guilty.

Now, there are these opposing contentions in the case: The prosecution contends that the defendant being of sound memory and discretion did kill Catherine Reardon purposely and of his deliberate and premeditated malice and is guilty of murder in the first degree.

They insist that the circumstances do prove the fatal acts were committed with deliberation and premeditation.

In behalf of the defendant, it is contended that he was insane, and therefore not legally responsible, hence should be acquitted by reason of insanity.

It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter, according as you may find he acted with or without malice.

Although not disputed, you must nevertheless find beyond a reasonable doubt that Catherine Reardon was killed in the District of Columbia by the defendant. If you do so find, then I suggest that you next determine whether or not he was sane at the time, for if insane, that will end further consideration of the case.

The law only holds a sane person responsible for acts of a criminal nature. The statutory definition of murder requires that one be of sound memory and discretion, and that in legal concept a sane person.

Therefore, sanity is an element of that crime.

A sound mind is a usual and normal condition of most human beings, hence the law presumes one accused of crime to have been sane and possessed of sufficient reason to be responsible for his act.

At the trial, the prosecution may rest upon that presumption until some evidence appears to the contrary. Then the burden does fall upon it to prove beyond a reasonable doubt that the accused was of sound mind, just as it must prove all other elements constituting the offense.

Insanity, according to the criminal law, is a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act. There must be actual disease or defect of the mental faculties, so far impairing the reason or will that this test of sanity cannot be met, before one is relieved of his criminal act.

The fatal actions must be traceable back to a diseased or deranged mentality.

Here it is contended that although the defendant may have understood what he was doing when he assaulted Miss Reardon, and may have known it was wrong, yet he was impelled by an irresistible impulse to do the violent acts which caused her death.

If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions

were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong.

If, as I have said, there was such lack of willpower and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough.

Consider fairly the evidence upon this issue of insanity. If you believe the defendant was insane, or have a reasonable doubt about his sanity, your verdict will be "not guilty by reason of insanity."

If you find beyond a reasonable doubt that he was of sound memory and discretion, you will pass on to consideration of the remaining issues in the case.

I have stated that the indictment presents within its terms the three degrees of unlawful homicide—murder in the first degree, murder in the second degree, and manslaughter.

I shall explain them in that order.

Murder in the first degree is the killing of a human being purposely and with deliberate and premeditated malice. The crime involves these elements:

First, the fatal act purposely done. Of that, nothing more need be said.

Second, malice.

Third, premeditation.

Fourth, deliberation.

All these are elements which go to constitute the crime of murder in the first degree. Therefore, each and all must be established by the evidence beyond a reasonable doubt.

Malice is a basic element of murder in both the first and the second degrees.

In common parlance, the word signifies feelings of anger, hatred, or illwill. Such feelings, may, of course, actuate the killing of a human being, and often do.

However, the law has given to the term "malice" a special meaning. It is the intentional doing of a wrongful act to the injury of another under circumstances which do not legally justify or palliate the act.

As applied to the crime of murder, malice is the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief.

Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.

Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.

The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued.

If, therefore, one tempted to take human life, gives thought to such an idea and forms a specific intent to kill, then reflects upon that purpose and holds to it, then, in the execution of that purpose slays the object

of his evil design, he does thereby kill purposely and of his deliberate and premeditated malice, and is guilty of murder in the first degree.

Now, review the evidence fully and fairly. Determine whether or not the defendant did kill Catherine Reardon purposely and of his deliberate and premeditated malice. If you believe beyond a reasonable doubt that he did so, your verdict will be "guilty of murder in the first degree."

However, if you have a reasonable doubt as to any element of that offense, you will not convict him of murder in the first degree, but will pass on to a consideration of the crime of murder in the second degree.

Murder in the second degree is the killing of a human being with malice, but without premeditation or deliberation. Malice has been explained.

You will recall that it does involve an intent to kill. That intent may be express or implied. It is express when there is an actual specific purpose to kill. It may be implied when the assault is of such a nature as that the natural and probable consequences would be death. Where a deadly weapon is used, or other means employed, in a manner likely to cause death, malice may be inferred for the law presumes one to intend the natural and probable consequences of his willful act. The design to kill and the fatal act may be instantaneous. No appreciable time need elapse between the two. If you do find from the evidence, beyond a reasonable doubt, that the defendant did kill Catherine Reardon with malice aforethought, your verdict will be "guilty of murder in the second degree."

If you have a reasonable doubt, you will not find him guilty, but pass on to consider the charge of manslaughter. That is the killing of a human being without malice aforethought. It may be voluntary or involuntary.

Here you will consider whether or not the killing does constitute involuntary manslaughter. If there was no actual intention to kill, but death nevertheless resulted from the defendant's violent acts, yet those acts were

not of a kind that death would likely have followed as a natural and probable consequence, then the crime would be manslaughter.

In those circumstances, the element of malice, or intent to kill, essential to second degree murder, would be lacking, and thus reduce the killing to manslaughter.

If you find beyond a reasonable doubt that the defendant did kill Catherine Reardon without malice aforethought, your verdict will be guilty of manslaughter. If you have a reasonable doubt, your verdict on the whole indictment will be "not guilty." That would necessarily follow for if consideration of all degrees of unlawful homicide leaves a reasonable doubt of guilt as to any, it would be your duty to acquit.

There is evidence tending to prove that the defendant, after his arrest, made to police officers oral and written statements of an incriminating nature. It is contended that some of the statements were not made at all, and that those which were made were not given voluntarily, but were coerced by force, violence and fear.

If the statements were so induced they would not be voluntary, and hence would not be admissible against the defendant. Should you so find, you will disregard them, put them entirely out of mind, and determine the case solely upon the remaining evidence.

The law does not countenance the giving of statements by force or I should say the gaining of statements by force, or fear, or hope of favor or reward. They must be free and voluntary. If you believe they were so given, you will consider them, according such credit and weight, if any, as in your judgment you believe them worthy of in the light of all the other evidence.

Certain witnesses have testified that the defendant enjoyed a good reputation for peace and order in the community. If you believe he was a man of good character you will treat it as a fact in his favor bearing upon the question of guilt as also the degree of guilt, if any. It may be that evidence of good character like

any other evidence in the defendant's favor, may alone, or together with other evidence, convince you of his innocence, or at least raise a reasonable doubt of his guilt.

In judging of the evidence, you must necessarily evaluate the testimony of individual witnesses. Only thus can you determine the truth; and it is the truth you must seek.

Bring to that task your knowledge of human nature; your ability to judge of men; their sources of knowledge; their intelligence; their motives; their intentions; so you may discern the real character behind the spoken words and measure their weight of truth and accuracy.

Interest in those things involved within the controversy or its results, friendship or animosity towards persons concerned therein, and many other human factors may or may not affect the desire and capacity of a witness to tell the truth, depending largely upon his innate character. Give to the testimony of each witness only that weight to which, in your good judgment, it is entitled when tested by all those considerations, and in the light of all the other evidence in the case.

Manifestly, the defendant has a vital interest in the outcome of the case, and in considering his testimony in testing its truth, in weighing its force, you may do so in the light of that interest as well as in the light which may be shed by all the other evidence in the case.

Finally, ladies and gentlemen, in your deliberations give thought to the views of your fellow jurors. By full and free discussion apply your best reason and judgment, without sympathy or prejudice. Calmly and dispassionately endeavor to reach a common understanding as to the truth, and return a verdict accordingly.

Now, there are these possible verdicts. I have stated them before, and I will list them again.

One, not guilty.

Two, not guilty by reason of insanity.

Three, guilty of murder in the first degree.

Four, guilty of murder in the second degree,

Five, guilty of manslaughter.

Please attach no significance whatever to the order in which these possible verdicts have been stated. I have intended to give no intimation by such listing.

I have listed them in this manner, because it is in that logical order that I have suggested you consider the case which would present to you consideration of these several verdicts. Of course, there must be but one verdict, and it must be one of these five verdicts which I have enumerated. Then, too, bear in mind please that your verdict must be rendered upon either the first count or the second, and not upon both. You will determine which it is, if any.

If you do render a verdict that involves guilt, whether by reason of insanity, or otherwise. If there should be an unqualified verdict of "not guilty," it will be understood that that applies to both counts.

Now, ladies and gentlemen, as you retire to consider of your verdict, throughout the course of your deliberations be ever mindful of the solemn obligation imposed by your oath as jurors to render a true verdict according to the evidence, so help you God.

Thereupon, the jury retired to consider a verdict, and subsequently returned with a verdict of Guilty of Murder in the First Degree (571), on the first and second counts.

Thereupon, the following proceeding took place out of the hearing of the jury at the bench:

The COURT. That is contrary to the charge. I told them they should specifically indicate what count it is on. I will have to send them back and ask them to decide.

Thereupon, over the objection of the defendant, the Court further charged the jury:

The COURT. Ladies and gentlemen, I shall have to ask you to go back and determine upon what count, what specific count, either one or two, you find the defendant guilty. I thought I made that plain, but perhaps I did not. It is necessary to have the verdict

found on either the first or second count, but not on both.

You will take time to consider that question so that whatever finding you make, as to whether it is on the first or second count, that finding will be beyond a reasonable doubt in accordance with the allegations of that count (572).

I think you will see the necessity of that. Although there are two different killings alleged, mainfestly one cannot kill a human being twice, and hence it is essential that the verdict be definitely found on one count or the other. You will therefore determine that question with the same care as any other that involves an essential factor in the case.

Then let me know, and come back. Then, as to the other count, I will take care of that after you render your verdict. You will retire, please.

Thereupon the jury again retired to consider the verdict, and subsequently returned with a verdict of Guilty of Murder in the First Degree on the first count (573).

The jury was polled and thereupon the Court further instructed the jury:

The COURT. Now, members of the jury, by direction of the Court, you will return a verdict of not guilty to the second count of the indictment (575).

Pursuant to the instruction of the Court the jury returned a verdict of not guilty on the second count (575).

Respectfully submitted.

CHARLES H. HOUSTON,
Attorney for defendant.

Received copy of foregoing this 14th day of September 1944.

EDWARD M. CURRAN,
United States Attorney.

September 14, 1944, 11:30 a. m.

Approved as now submitted this 30th day of November 1944.

CHARLES B. MURRAY,
Asistant United States Attorney.

CHARLES H. HOUSTON,
Attorney for Defendant.

DOCKET ENTRIES (PARTIAL)

1944

Mar. 6—Presentment and indictment filed.

Mar. 14—Appearance of Charles H. Houston entered.

Mar. 18—Arraigned, plead not guilty, indictment read.

June 20—List of witnesses, list of jurors and a certified copy of original indictment served personally on the defendant 6/19/44 filed.

June 26—* * * Jury sworn * * *.

June 26—Motion to take a view filed and granted.

June 29—Trial resumed. Same jury. Verdict of guilty of first degree murder in the first count of the indictment. Verdict of not guilty by direction of the court on the second count. Jury polled. Defendant remanded. * * *

July 1—Motion for new trial filed.

July 7—Motion for new trial overruled. Sentenced to death by electrocution * * *.

July 8—Notice of Appeal filed.

Nov. 30—Bill of Exceptions submitted, settled, signed, made of record and filed.

Dec. 1—Designation of Record filed.

U. S. GOVERNMENT PRINTING OFFICE 1945

[fol. 115] In United States Court of Appeals, District of Columbia, January Term, 1945

Before Honorable Justin Miller, Henry W. Edgerton and Thurman Arnold, Associate Justices

No. 8809

Julius Fisher, Appellant,

vs.

United States, Appellee

Minute Entry—March 12, 1945

Argument commenced by Mr. Charles H. Houston, attorney for appellant, continued by Mr. Charles B. Murray, attorney for appellee, and concluded by Mr. Charles H. Houston.

[fol. 116] [File endorsement omitted]

In United States Court of Appeals, District of Columbia

No. 8809

Julius Fisher, Appellant,

v.

United States of America, Appellee

Appeal from the District Court of the United States for the District of Columbia

Argued March 12, 1945—Decided April 23, 1945

Mr. Charles H. Houston for the appellant.

Mr. Charles B. Murray, Assistant United States Attorney, with whom Mr. Edward M. Curran, United States Attorney, was on the brief, for appellee.

Before Miller, Edgerton and Arnold, Associate Justices

Opinion—Filed April 23, 1945

Arnold, Associate Justice:

This is an appeal from a judgment of conviction and death sentence for murder. The principal contention of

appellant is that the evidence is not sufficient to justify the jury in finding that the killing was premeditated.

There was no witness to the homicide, other than defendant. However, the defendant's own testimony showed that he first struck his victim because she had complained about his work. She then ran to the back of the room where the killing took place while he went to the floor above, got a stick from a fireplace, returned downstairs and killed her. In the killing he used the stick and also choked her. Finally, to insure her death he used a knife. All this showed a persistent purpose in the execution of the crime during an appreciable time. The evidence was sufficient to permit the jury to find deliberation.[1]

The second ground of error is the exclusion of an uncommunicated complaint which the defendant's victim had [fol. 117] made about his work prior to the offense. The complaint was not a threat; there was no claim of self-defense; it was, therefore, properly excluded.[2]

Expert evidence was introduced by appellant showing that he was a psychopathic personality of the predominantly aggressive type of behavior, and with an apathetic reaction to emotional situations. On the basis of this psychiatric testimony the appellant asked for the following instruction which was denied:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

The instruction confuses the issue of insanity with the question whether the psychopathic characteristics of the

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[1] *Bostic* v. *United States*, 68 App. D. C. 167, 94 F. (2d) 636 (1937), cert. den. 303 U. S. 635; *Bullock* v. *United States*, 74 App. D. C. 220, 122 F. (2d) 213 (1941), cert. den. 317 U. S. 627.

[2] For situations where such communications may be admitted, see 1 Wigmore, Evidence (3rd Ed. 1940), § 63.

appellant prevented him from forming the deliberate intent necessary to constitute first degree murder. For that reason alone it was properly refused. But even if these issues had been separated there was no evidence justifying an instruction on either of them. So far as insanity is concerned there was no testimony indicating appellant did not know the nature and character of his act or was not conscious of the difference between right and wrong. With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes.[3]

Modern psychiatry has given us much scientific information which disturbs the former certainty of our judgments of individual responsibility and moral guilt. It has revolutionized the methods of treatment and rehabilitation of prisoners. But the principal place for the application of such a therapeutic point of view where the court exercises discretion in the amount of the sentence and in the treatment of criminals is in our penal institutions. In the de- [fol. 118] termination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law.

The court instructed the jury as to the credibility of the witnesses as follows:

> "Interest in those things involved within the controversy or its results, friendship or animosity towards persons concerned therein, and many other

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[3] "The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, because of the restraint which he practices in his dealings with his fellows." *Hart* v. *United States*, 76 U. S. App. D. C. 193, 193, 130 F. (2d) 456, 458 (1942).

human factors may or may not affect the desire and capacity of a witness to tell the truth, depending largely upon his innate character. Give to the testimony of each witness only that weight to which, in your good judgment, it is entitled when tested by all those considerations, and in the light of all the other evidence in the case.

"Manifestly, the defendant has a vital interest in the outcome of the case, and in considering his testimony in testing its truth, in weighing its force, you may do so in the light of that interest as well as in the light which may be shed by all the other evidence in the case."

The appellant's objection to the last portion of the above instruction is without merit.[1]

Affirmed.

[fol. 119] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia, April Term, 1945

No. 8809

Julius Fisher, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the District of Columbia

Judgment—Filed April 23, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

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[1] *Bishop* v. *United States*, 71 App. D. C. 132, 138, 107 F. (2d) 297 (1939); *Reagan* v. *United States*, 157 U. S. 301, 305 (1895).

District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Arnold.

Dated April 23, 1945.

[fol. 120] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR REHEARING AND MODIFICATION OF JUDGMENT—Filed April 28, 1945

Appellant Julius Fisher petitions the Court for rehearing on the issue of the standard of proof and relevancy of evidence going to the issue of deliberation and modification of the judgment of this Court entered April 23, 1945, affirming the judgment and sentence of the United States District Court for that this Court confused the question of complete acquittal with the question of distinguishing the degree of crime between murder in the first degree and murder in the second degree.

D. C. Code 1940, Title 22, Secs. 2401 and 2403.

It has never been seriously contended that appellant should be acquitted of all criminal responsibility for the killing in this case but it has been and still is most seriously contended that he is not guilty of murder in the first degree. The rule of law set up by the District Court and affirmed by this Court in its opinion depriyed him of having the jury consider the essential elements of his individual personality in the determination of the degree of his guilt. While it may well be argued that the question of provocation to crime is to be adjudged on the standard of a reasonable man, *Hart v. United States*, 76 U. S. App. D. C. 193 (1942); cited by this Court in Footnote 3 to the opinion, nevertheless on the question of deliberation the standard of necessity must be not whether a reasonable man would have deliberated, but whether in fact this defendant deliberated [fol. 121] before the killing. The variations in the law have been introduced not by the Court but by Congress itself. If there is uncertainty in marking the area between

murder in the first degree and murder in the second degree, the uncertainty was deliberately introduced by the Congress in a spirit of merciful administration of justice, leaving the issue to be determined in the individual cases by the verdict of the jury on the particular record before it. What the appellant complains about is that the ruling of the District Court as affirmed by this Court withdrew from the jury substantial and material evidence bearing on this issue and that therefore the judgment should be reversed and the cause remanded for a retrial in which the standard placed before the jury on the issue of deliberation would be "the entire personality of the defendant, mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

Charles H. Houston, 615 F Street, N. W., Attorney for Appellant.

(Service on original.)

[fol. 122] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed May 7, 1945

On consideration of appellant's petition for rehearing filed herein, it is

Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated May 7, 1945.

[fol. 123] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 29, 1945

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Transcript of record.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. Petition for rehearing.
6. Minute entry of denial of petition for rehearing.
7. This designation.
8. Clerk's certificate.

Charles H. Houston, Attorney for appellant, 615 F Street, Northwest.

CERTIFICATE OF SERVICE

I certify that I have this date mailed a copy of the foregoing Designation of Record to the United States Attorney for the District of Columbia, postage prepaid.

Charles H. Houston.

[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 122

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 8, 1945

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this motion.

[fol. 126] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 122

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 122

JULIUS FISHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

CHARLES H. HOUSTON,
615 F Street, N. W.,
Washington, D. C.,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 122

JULIUS FISHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Your petitioner, Julius Fisher, respectfully requests this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia (April 23, 1945; rehearing denied May 7, 1945) affirming a judgment of the United States District Court for the District of Columbia sentencing him to be electrocuted following his conviction of murder in the first degree. The date of his execution is now set for June 29, 1945.

Basis of Jurisdiction

Jurisdiction is invoked under Judicial Code Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C., sec. 347).

Statute Involved

The statute involved is the Act of Congress March 3, 1901, c. 854, secs. 798 and 800, 31 Stat. 1321 (D. C. Code, 1940, title 22, secs. 2401 and 2403, which are set out in full in the Appendix. The relevant portions are:

> Sec. 798. "Whoever, being of sound memory and discretion, kills another purposely * * * of deliberate and premeditated malice * * * is guilty of murder in the first degree."
>
> Sec. 800. "Whoever, with malice aforethought * * * kills another, is guilty of murder in the second degree."

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia which has not been officially reported, appears in the Record at pp. 115-118.

Questions Presented

Under the Act of Congress March 3, 1901, c. 854, above cited:

(1) Are psychiatric aggressive tendencies, low emotional response and borderline mental deficiency which are insufficient to justify a finding of not guilty by reason of insanity, nevertheless to be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree?

(2) Are the issues of deliberation and premeditation raised by an indictment for murder in the first degree to be determined by the standard of a reasonable man, or by consideration of the personality of the individual accused of the crime?

Salient Facts

Petitioner, a Negro janitor at the Washington Cathedral in the District of Columbia, allegedly killed a white woman, the Librarian, March 1, 1944 in the Library building on the Cathedral grounds in a dispute arising over the manner of his work. Petitioner claimed the killing was not premeditated but committed under impulse of an epithet addressed to him by the Librarian and of her screaming (R. 59).

Psychiatrists testified both for the defense and for the Government: for the defense, that petitioner had the mental age of a child 11 years 4 months, an I. Q. of 76, which is on the borderline of mental deficiency; that his eyes were mongoloid, his reflexes hyperactive; that he exhibited a definite flattening of emotional response, and was a psycopathic personality of the predominantly aggressive type of behaviour, purely of an impulsive nature (R. 89-90). The Government psychiatrist gave his opinion that petitioner was not set off by automatic impulses, might easily have acted under anger without being mentally diseased, was probably very mad, and that there was provocation (R. 92-95).

The District Court refused to charge the jury as requested by petitioner in his request No. 6, to which petitioner duly noted an exception:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case" (R. 102).

The District Court charged the jury it might find the defendant not guilty by reason of insanity if at the time of the killing mental disease had made him "incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act"; or if a diseased condition of his mind had so far destroyed his will that his actions were beyond control of his will, although he might then have understood the nature of his acts and been conscious that they were wrong. The Court gave no instruction that once having found the defendant of sound memory and discretion according to the tests outlined above, the jury might still consider the evidence of defendant's mental condition on the issue whether the killing was with deliberate and premeditated malice, to determine whether the crime was murder in the first degree, murder in the second degree, or manslaughter (R. 103-112).

In affirming the judgment, the Court of Appeals stated *inter alia*:

> "With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes. (3)
>
> Footnote: "(3) 'The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, because of the restraint which he practices in his dealings with

his fellows.' Hart v. United States, 76 U. S. App. D. C. 193, 195, 130 F. (2d) 456, 458 (1942)." (R. 117).

Petitioner applied for rehearing on the ground that the appellate court had confused the test of insanity justifying complete acquittal with the issue of a mental condition to be considered in determining whether the degree of crime was murder in the first degree or murder in the second degree, and that the rule established by the trial court and affirmed by the appellate court deprived petitioner of his right to have the jury consider the essential elements of his individual mental condition and personality in determining the degree of his guilt (R. 119-120). The petition was denied without an opinion (R. 120).

Reasons Relied On for Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction of an Act of Congress which has not been but should be decided by this Court. It is petitioner's contention that the Court of Appeals failed to recognize and give effect to the distinction made by Congress between murder in the first degree and murder in the second degree.

2. The said Court erred in holding that a defective mental condition, insufficient to sustain an acquittal on the ground of insanity, may not be considered in determining the degree of crime, between murder in the first degree and murder in the second degree, thereby depriving this defendant on trial for his life of the benefit of relevant and perhaps decisive evidence in his favor.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore he prays that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

All of which is herewith respectfully submitted this 9th day of June, 1945.

JULIUS FISHER,
Petitioner,
By CHARLES H. HOUSTON,
615 F Street, Northwest,
Washington 4, D. C.,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 122

JULIUS FISHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia which is not yet officially reported appears in the Record at pp. 115-118.

Grounds for Jurisdiction

Jurisdiction is invoked under Judicial Code section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. sec. 347). A concise statement of the grounds on which jurisdiction is invoked is contained in the Petition, reference to which is hereby respectfully made.

The decision of the Court of Appeals was entered April 23, 1945; petition for rehearing was denied May 7, 1945.

Salient Facts

Petitioner, a Negro janitor at the Washington Cathedral, was convicted of murder in the first degree for killing the Librarian, Catherine Cooper Reardon, March 1, 1944, in the Library building on the Cathedral grounds. There were no witnesses; the two parties were in the building alone.

The library building is built on a slope, with the front vestibule on street level. Off the vestibule is a small reading room. The room and librarian's desk are on the floor below. The rear windows of the stack room open out on the down slope. The building is small.

About a week before the killing the Librarian had complained to the verger of the Cathedral about dirt under her desk. The verger told petitioner to take care of the matter but not to mention it to the Librarian as she was peculiar. Petitioner received the complaint with no show of resentment (R. 13).

On the morning of the killing petitioner was dusting books in the stacks, near the Librarian's desk. The Librarian complained of dust on her desk; petitioner protested he had dusted and always tried to do his work. The Librarian countered with, "You black nigger, you should be able to keep this place clean. That's what they are paying you for". He lost control of himself and impulsively smacked her. She ran screaming back toward the windows in the rear of the stack room (R. 59).

Petitioner ran out the room up the steps to leave the building, but as he ran up the steps the screaming kept scaring him. When he got to the top of the landing, he ran in the reading room which had a fire place, got a stick of firewood, ran back downstairs and struck her with it. He said he was not trying to kill her, but just trying to stop the noise.

The stick broke. He began choking her until she stopped hollering. He then dragged her by the hands out of the stack room to a small lavatory off the stack room where he left her while he got toilet paper to go back and wipe up the blood stains on the floor. While he was wiping up the blood stains she started hollering again. He came back, took his knife out and stuck her in the throat. The knife did not penetrate the muscles, merely made a superficial wound. He said his idea was just to stop her from hollering; that was all he could think about.

After that she stopped hollering. He put her body in a steam pipe tunnel, and left the grounds (R. 60).

The chief evidence for the prosecution was police testimony concerning an alleged confession petitioner made after his arrest. In this confession the police have petitioner saying when he began strangling the deceased: "If I don't kill you it will be the last of me", and that the last thing he did before he left her was to stick her in the neck with his knife to make sure she was dead. Petitioner denied the police version of the confession.

Psychiatrists testified on both sides: for the defense, that petitioner's mental age was that of a child 11 years 4 months old; his I. Q. was 76, which is on the borderline of mental deficiency; his eyes were mongoloid and reflexes hyperactive; that he exhibited a definite flattening of emotional response, and was a psycopathic personality of the predominantly aggresive type of behaviour, purely of an impulsive nature. For the prosecution: that petitioner was not set off by automatic impulses, might easily have acted under anger without being mentally diseased, was probably very mad, and there was provocation. At the trial petitioner's counsel made no serious effort to deny the killing or to exculpate petitioner from all blame. He concentrated on resisting a conviction of murder in the first degree.

The trial court refused to give the jury petitioner's requested prayer No. 6, to which petitioner duly excepted:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case".

In its charge to the jury the trial court covered the questions of premeditation and deliberation in the following language:

> "Then there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.
>
> "Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.
>
> "Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact deliberation.
>
> "The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact

deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued."

"If, therefore, one tempted to take human life, gives thought to such an idea and forms a specific intent to kill, then reflect upon that purpose and holds to it, then, in the execution of that purpose slays the object of his evil design, he does thereby kill purposely and of his deliberate and premeditated malice and is guilty of murder in the first degree.

"Now, review the evidence fully and fairly. Determine whether or not the defendant did kill Catherine Reardon purposely and of his deliberate and premeditated malice. If you believe beyond a reasonable doubt that he did so, your verdict will be "guilty of murder in the first degree."

On appeal the United States Court of Appeals for the District of Columbia, in affirming the judgment of the trial court stated, *inter alia:*

With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes (3)".

Footnote (3) The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, because of the restraint which he practices in his dealings with his fellows" *Hart* v. *United States*, 76 U. S. App. D. C. 193, 195, 130 F. 2d 456, 458 (1942).

As noted above petitioner filed his petition for rehearing calling attention of the Court to the point that it had confused the question of complete acquittal with the question of distinguishing the degree of crime between murder in the first degree and murder in the second degree and that the rule of law set up by the District Court and affirmed by the appellate court deprived petitioner of this right to have the jury consider the essential elements of his individual personality in the determination of the degree of his guilt. The petition was denied without an opinion.

Specification of Errors.

1. The Court of Appeals erred in holding that psycopathic aggressive tendencies, low emotional response and borderline mental deficiency insufficient to support a finding of not guilty by reason of insanity could not be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree under Act March 3, 1901, c. 854, *supra*.

2. The Court of Appeals erred in holding that the issues of deliberation and premeditation raised by an indictment for murder in the first degree should be determined by the standard of a reasonable man, instead of by the personality of the accused on trial.

Argument.

I

Mental disease or mental deficiency of the accused are relevant factors to be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree.

The fact that petitioner killed the deceased is not seriously disputed; the prime question arises on the degree of his guilt. The killing itself was particularly violent, but

the very violence itself and an utter lack of planning indicate it was an impulsive killing, and not done with deliberation and premeditation. Even the Government does not contend that petitioner developed an intent to kill until he went in the Library reading room and got the stick of firewood.

Congress established the distinction between murder in the first degree and murder in the second degree in the Act of March 3, 1901, *supra*. The distinction between the two rests on "deliberate and premeditated malice" which is a condition of murder in the first degree. Deliberation and premeditation are a condition of the mind of the accused which are not determined merely by the lapse of time.

> "It is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused, concerning a design or purpose to kill. * * * Lapse of time is important because of the opportunity which it affords for deliberation." Per Miller, J. in Bostic v. U. S., 68 App. D. C. 167, 94 F 2d 636 (1937).

Since some minds function more rapidly than others, it becomes specially important to determine the mental condition of the accused at the time of the fatal act.

> *McAfee* v. *U. S.*, 72 App. D. C., 60, 66, 111 F. 2d 199 (1940).

> When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness, or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. Per Gray, J. in Hopt v. U. S., 104 U. S. 631, 634 (1882).

This is clearly recognized in the case of homicide committed while intoxicated both by the Court of Appeals (*Mc-*

Afee v. *U. S.*, *supra*) and by this Court (*Hopt* v. *U. S.*, *supra*) where a temporary stimulant obfuscates an ordinarily normal mind. The argument is stronger where the obfuscation is chronic and due to disease and congenital deficiency.

> "While the jury found that his condition in that respect (mental condition) was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to cooly deliberate and premeditate on his acts. The jury, therefore, as hereinafter suggested, should have been instructed to consider all of the foregoing evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt." Per Frick, Jr. in State v. Anselmo, 46 Utah 137, 145, 148 P. 1071 (1915).

If intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect.

The effect of the charge of the trial court and the decision of the Court of Appeals was to deprive petitioner of all benefit of the evidence regarding his mental condition at the time of the crime. According to both courts petitioner was either wholly insane and therefore completely relieved of criminal responsibility, or else wholly normal and fully responsible. The assumption is contrary to the facts and common sense. The correct rule is stated in the charge of the trial court, approved by the Court of Errors and Appeals in *State* v. *Schilling*, 94 N. J. L. 145, 148, 112 A. 400 (1920):

> "* * * if at the time of doing the act the evidence shows you that this defendant was so feeble-

minded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its deliberate and premeditated character, then, although it is no defense or justification, his offense would be murder in the second degree."

The point has not been expressly ruled on by this Court, and we submit that the interests of a just administration of the criminal law require that this Court hear and determine the issue.

II

The issues of deliberation and premeditation raised by an indictment for murder in the first degree should be determined not by the standard of a reasonable man, but by consideration of the personal traits and mental condition of the individual accused of the crime.

The Court of Appeals adopted the standard of a reasonable man because otherwise the jury might feel itself "at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes," and in support of its position cited *Hart* v. *U. S.*, 76 U. S. App. 193, 130 F. 2d 456 (R. 117).

The Court confused *provocation* to crime which may well be tested by the standard of a reasonable man, with the question of determining the degree of guilt, which is a totally different issue.

State v. *Anselmo, supra.*

The words of the statute "*of deliberate and premeditated malice*" are meaningless unless they refer to the mental condition of the accused himself. If the mental condition of the individual accused introduces a variable in the administration of the criminal law, it is a variable introduced by Act of Congress which the courts are not at liberty to disregard.

The charge of the trial court gave the jury no guidance on the question whether this particular accused had the power to deliberate and form a premeditated plan to kill the deceased. This omission is all the more pointed when one considers the detail with which the trial court discussed the degrees of crime and standards of guilt (R. 103-112). In short, the trial court substituted a normal, healthy mind for the diseased mentality and congenital defectiveness of petitioner. It submitted the case of "a reasonable man" to the jury but not that of this petitioner.

In its opinion the Court of Appeals, after summarizing some of the evidence, stated:

> "All this showed a persistent purpose in the execution of the crime during an appreciable time. The evidence was sufficient to permit the jury to find deliberation." (R. 116).

On the standard of a reasonable man, there is no disagreement. On the basis of this petitioner, a man of psycopathic aggressive tendencies, low emotional response and borderline mental deficiency, there is grave doubt. At all events, the proper administration of criminal justice, the correct interpretation of the Act of Congress March 3, 1901 above cited, required the issue to be submitted to the jury on the basis of the personal traits and characteristics of the accused himself, which was not done.

For these reasons it is respectfully submitted this Court should issue its writ of certiorari as prayed.

Respectfully submitted,

CHARLES H. HOUSTON,
Attorney for Petitioner,
615 F Street, Northwest.

APPENDIX

D. C. Code 1940, Title 22
Section 2401

Whoever being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in Section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or, in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree. (Act March 3, 1901, 31 Stat. 1321, c. 854, sec. 798; June 12, 1940, 54 Stat., ch. 339, sec. 1.)

D. C. Code 1940
Section 2402

Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree. (Act of March 3, 1901, 31 Stat. 1321, c. 854, sec. 799.)

Section 2403

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Act of March 3, 1901, 31 Stat. 1321, c. 854, Sec. 800; June 12, 1940, 54 Stat. ——, c. 339).

Section 2404

The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years. (Act of March 3, 1901, 31 Stat. 1321, c. 854, sec. 801; January 30, 1925, 43 Stat. 798, c. 115, sec. 1.)

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No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1945

JULIUS FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 115–118) is reported at 149 F. 2d 28.

JURISDICTION

The judgment of the Court of Appeals was entered April 23, 1945 (R. 118–119), and a petition for rehearing (R. 119–120) was denied May 7, 1945 (R. 120). The petition for a writ of certiorari was filed June 9, 1945, and was granted October 8, 1945 (R. 122). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in petitioner's trial for murder in the first degree, the trial court was required to instruct the jury that on the issues of deliberation and premeditation they should consider evidence concerning petitioner's mental and emotional characteristics, such evidence, however, not establishing that he was legally insane.

STATUTES INVOLVED

The District of Columbia Code (1940) provides in part:

> Section 22–2401: Whoever, being of sound memory and discretion, kills another purposely * * * of deliberate and premeditated malice * * * is guilty of murder in the first degree.
>
> Section 22–2403: Whoever with malice aforethought, except as provided in section(s) 22–2401, * * * kills another, is guilty of murder in the second degree.
>
> Section 22–2404: The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years.

STATEMENT

An indictment in six counts was returned against petitioner in the United States District Court for the District of Columbia charging that he murdered Catherine Cooper Reardon on March 1, 1944. Count 1 alleged that he purposely killed the victim with deliberate and premeditated malice by choking and strangling her, and count 2 alleged that he killed her by beating her with a stick (R. 1–6).[1] After a jury trial, petitioner was found guilty on count 1 and, by direction of the court, he was found not guilty on count 2 (R. 7–8, 112–113). Petitioner received the mandatory death sentence (R. 9–10), and on appeal to the Court of Appeals for the District of Columbia, the judgment was affirmed (R. 115–119).

The evidence adduced at petitioner's trial may be summarized as follows:[2]

The deceased was employed in a library at the Washington Cathedral (R. 12, 14, 44). On the morning of March 2, 1944, she was found dead; her body was discovered in a steam pipe tunnel in a subbasement of the Cathedral (R. 14, 25). An autopsy disclosed that death was caused by

[1] At the close of its case, the Government abandoned the other counts (R. 56), which charged the murder by pushing the victim against a sharp object, and that it was committed in the perpetration of a robbery.

[2] Petitioner did not dispute that he killed Miss Reardon, but claimed, as he does now, that he was not guilty of a premeditated deliberate murder (see R. 11–12; Pet. 3, 9).

fractures of the skull or asphyxia due to strangulation (R. 26–27). Petitioner, who was employed as a janitor at the Cathedral, was arrested later during the day of March 2 (R. 19, 57).[3] After his arrest, he made a statement to the police concerning the killing, which was received in evidence (Gov. Ex. 33, R. 47, R. 49–55). In this statement, petitioner said that he went to the library at 9:00 A. M. on March 1, 1944, and there saw the deceased. He told her that he understood that she had complained about dirt or dust under her desk, and she said that she could not "see why you can't clean it every day 'cause you are getting paid for that." Then she called him, "You black nigger," whereupon petitioner said, "Wait a minute; I don't like that," and he "smacked her." The deceased ran down "in the back and she started hollering. I had actually gotten mad at that time and ran upstairs and got a stick of wood from the fireplace and came back down. She started hollering again and I struck her over the head with the stick of wood. Then I also said 'If I don't kill you, it will be the last of me'" (R. 51). When the deceased continued screaming, petitioner choked her, and she fainted. Then he carried her to the basement where he "finished" her by cutting her throat.[4]

[3] Petitioner was arraigned the following morning on a murder charge (R. 47).

[4] The autopsy showed a small superficial stab wound on the deceased's neck (R. 26–27).

He removed the deceased's undergarments which he used to clean the blood from the library floor, took a ring from her finger, and went home. The principal reason he assaulted her was that she had reported him for failing to clean the floor (R. 51–55.)

At the time of the trial petitioner, according to his testimony, was 32 years of age and was married. He was born in Virginia and was reared by his grandmother, his mother having died when he was quite young. He quit school in the third grade. After he left school, he "did different kinds of work, like working on a farm." He finally came to Washington, where he worked at one job as a chauffeur and butler for five years, quitting "because I couldn't get a raise." Thereafter he "worked at different jobs, chauffeuring and butlering." He then became an elevator operator, and later got a job with a chemical company as a household fumigator, which, apparently, he held for three years. He received a raise in salary at this job but quit because he was required to work on Sundays, the "only day I had to be with my wife." On December 20, 1943, he went to work at the Cathedral at, evidently, a higher salary (R. 56–57, 73, 85). Except for several convictions for drunkenness, it was stipulated that peti[illegible] had no prior criminal record (R. 64, 73). He [illegible]joyed, according to one of his neighbors, a "very, very

good" reputation in the community in which he lived for "peace and good order" (R. 91).

Petitioner testified that he had no intention of killing the deceased; that he became angry because of the epithet addressed to him by the deceased; "I got angry at what she said. Then I smacked her. I felt like I got angry inside. * * * No white person had ever called me a 'nigger' before. I had been called that by my own colored people. * * * She ran out from behind her desk, down toward the back, screaming. I started upstairs, to run up. The screaming seemed to have gotten on my nerves. * * * When I got up to the top of the steps, the noise got so loud, it kept scaring me. I ran into the library, got the stick of wood, ran back downstairs and started * * * striking her with it.[5] The stick broke. She was still screaming, and I began choking her then. She seemed to have become unconscious and I [took] her by the hand and started to drag [her] out. * * * When I struck her with the stick I was not trying to kill her, I was just trying to keep her from making a noise. When I began choking her, I was not trying to kill her; she started hollering and I tried to stop her from hollering. * * * She stopped finally and I did not strike her * * * after the noise had ceased. * * * While I was * * * cleaning up the spots on

[5] Petitioner testified that it took him about a minute to get the stick (R. 76).

the floor, she started hollering again. She kept hollering, seemed like to me. She kept trying to holler. I took out my knife and stuck her in the throat. My idea was just trying to stop her from hollering * * *. The noise kept on getting on my nerves. * * * Before Miss Reardon called me 'nigger,' I had no feeling at all against her" (R. 59–60, 64; see also R. 75–77, 81–83).

Prior to the introduction of any psychiatric testimony for the defense, the question arose, during a colloquy between court and counsel, as to the permissible limits of such testimony. It apparently was the position of petitioner's counsel, at least initially, that while he was not prepared to show that petitioner was mentally incapable, in the legal sense, of committing the crime, since he knew the difference between right and wrong and was able to choose the right, petitioner was entitled to have the jury consider that his capacity to deliberate was impaired by reason of mental abnormality (R. 64–69). When the trial judge pointed out that, in his view, that was not sufficient (R. 66), petitioner's counsel asserted that petitioner's evidence would show that "his deliberation was impaired"; that he "couldn't actually" deliberate; that "he hasn't the capacity" (R. 69); that he "was incapable of resisting" because of "an irresistible impulse" (R. 70). While petitioner's counsel continued to insist that he was not claiming that petitioner

was legally irresponsible, the judge felt that he was actually, in essence, so claiming, and hence that it would be safer to allow him to proceed with the development of his expert testimony, since, otherwise, there might be an improper rejection of the defense of insanity (R. 70–72).

The expert testimony as to petitioner's mental condition was:

Testifying for petitioner, Mrs. Campbell, clinical psychologist at Howard University, stated that she gave petitioner "an intelligence quotient or psychological test," and that it disclosed that petitioner's mental age was eleven years and four months, which placed him in the "borderline deficiency" group; she used "the year 15 as the basal age in computing her intelligence test" (R. 83–84, 102). On cross-examination the witness conceded that her examination did not take into account that petitioner "had successfully carried on the work of a chauffeur and butler in the home of an Army officer [for five years], and for some three years had worked successfully for a chemical company" (R. 85). This witness further conceded that she did not know "whether a grown person of a mental age of eleven years and four months could hold a job as a butler and chauffeur. I believe he could be assigned to do work as an exterminator, going around and disinfecting closets in homes and things like that, just routine work with no actual skill required" (R. 86).

Dr. Williams, a neurologist and psychiatrist on the medical faculty of Howard University, also testifying for petitioner, stated that he had given petitioner four examinations, as a result of which he found a "history of dipsomania, chronic alcoholism, over a period of fourteen years, with several arrests; evidence of introversion; lack of aggressiveness prior to drinking which was definitely sublimated on drinking; a history of exaggerated reflexes; a flattening of effect; Veiaguth's fold [found quite frequently in constitutional defects in which the individual is subject to marked depression]; * * * a limitation of information, judgment and comprehension. I think this man shows definitely evidence of what I call a psychopathic personality, and that the alcoholism is but a symptom of the total picture. This picture, so far as the psychopathic personality is concerned, shows the predominantly aggressive type of behavior, purely of an impulsive nature. The fact his memory is good is characteristic of the type of reaction one gets in an aggressive type of psychopath" (R. 86–89).[6]

[6] Evidence was adduced as to whether petitioner was a syphilitic. The defense showed that petitioner had had syphilis in 1942 and 1943 (R. 97), and a witness testified that tests he had performed indicated that petitioner was suffering at the time of the trial in June 1944 from syphilis (R. 96–97). Dr. Williams testified that while he did not participate in the tests, he had heard the testimony in respect of them, and neurosyphilis would furnish a basis for the findings

On direct examination, no opinion was expressed by Dr. Williams as to petitioner's ability to deliberate, but, on cross-examination, in response to questions by the prosecutor, Dr. Williams stated: "I can not answer 'yes' or 'no' whether [petitioner] was of unsound mind at the time he killed Catherine Reardon. I doubt whether he had the ability to distinguish between right and wrong, but I can not answer the question categorically. * * * I think he was unable to resist the impulse to kill her by reason of a deranged mental condition. I doubt whether he was able to entertain an intent to kill her. His inability to entertain that intent was partly due to a deranged mental condition. It is very hard to divorce a mental condition from an emotional condition. * * * it was due mostly to a mental condition. You have here a psychopathic personality associated with chronic alcoholism and with early schizoid tendencies. * * * Chronic alcoholism could be evidence of a psychosis. It is not a mental disease in itself. Schizoic tendency is a mental disease. A person with a psychopathic personality is a borderline case. A psychotic person is a person of unsound mind. * * * Schizoic means a splitting of the per-

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he had made. He stated, however, that he did not think that petitioner had paresis (R. 97–99). In rebuttal, a government witness testified that tests which the witness had performed on petitioner negatived the finding of syphilis at the time of the trial (R. 99–100; see also R. 100–102).

sonality where the emotional life gradually twists from the normal pattern * * *. A schizoic person is both a sane person and an insane person at different times. At the time [petitioner] killed Miss Reardon he had all the elements of an insane person. He definitely showed signs of impulsive or uncontrollable urge. * * *—I can not answer whether [petitioner] was sane or insane when he killed Miss Reardon by categorical answer 'yes' or 'no'" (R. 90).

In rebuttal, the Government introduced the testimony of Dr. Griffin, senior medical officer at St. Elizabeths Hospital and psychiatrist on the medical faculties of George Washington and Catholic Universities, who stated that he had not examined petitioner but had listened to considerable portions of the testimony of petitioner and Mrs. Campbell, as well as the testimony of Dr. Williams. On the basis of such testimony, Dr. Griffin testified that there was nothing which would lead him to believe that petitioner was of unsound mind, although, in the absence of his examination of petitioner, he would not want to make a definite statement. Dr. Griffin testified that "A psychopathic personality is a person of unsound mind. A person who just shows schizoic tendencies is a person of sound mind"; that about fifty percent of all normal people are schizoid personalities, i. e., "introverts"; that "schizophrenia is a term used by many psychiatrists as

a synonym of dementia praecox, but the terms schizoid tendencies and schizophrenia or schizophrenic tendencies should not be confused"; that "In all probability if you have a person who has been termed a psychopathic personality associated with chronic alcoholism, he is of sound mind"; that he "had no reason to believe [petitioner] didn't have that power of thinking the thing through, making that determination from what I know of the case" and that a person who had the mental age of petitioner was "able to think very nearly as well as a normal person. In other words, they have nearly 80% of intellectual ability." Finally, Dr. Griffin testified that he did not believe petitioner "was set off by automatic impulses * * * probably he was very mad and there was provocation. He might easily have acted under anger without being mentally diseased'" (R. 92–94).

Before counsel summed up to the jury, petitioner offered several prayers for instructions, of which No. 6 was as follows (R. 102):

> The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous,

emotional and physical characteristics as developed by the evidence in the case.

The trial judge refused to grant this instruction, and petitioner excepted (R. 103).

The judge charged the jury that in order to find petitioner guilty of murder in the first degree, the evidence must establish beyond a reasonable doubt that the killing was done with deliberate and premeditated malice. He defined malice as "the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief"; deliberation as "consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought"; and premeditation as "giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill" (R. 107–109). The judge also submitted to the jury the question of petitioner's guilt of murder in the second degree, which he defined as "the killing of a human being with malice, but without premeditation or deliberation." And, finally, he told the jury that if there was no "malice, or intent to kill, essential to second degree murder," the killing would be reduced to manslaughter (R. 109–110).

The judge also charged the jury that if they believed petitioner was insane, they should acquit

him. He defined insanity as "a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act. * * * If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong. If * * * there was such lack of will power and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough" (R. 106–107).

SUMMARY OF ARGUMENT

The question is whether it was error for the trial court to fail to instruct the jury that on the issues of deliberation and premeditation, statutory elements of first degree murder, they should consider evidence of petitioner's mental and emotional characteristics, concededly not amounting to legal insanity, for the purpose of reducing the homicide to second degree murder. This Court has never passed on the precise question here presented.

A. Modern criminologists have advanced several considerations for the adoption of the doctrine that mental impairment which does not amount to insanity in the legal sense should be permitted to be utilized in first degree murder cases on the issues of deliberation and premeditation for the purpose of reducing the degree of the homicide. There are, however, compelling reasons, which the criminologists themselves recognize, making against the acceptance of the suggested rule at this time. Additionally, the majority of jurisdictions, including the District of Columbia, have rejected the proposed rule, and have held that borderline mental deficiency cannot serve to lower the degree of homicide. It cannot be said, therefore, that the established rule is outmoded or altogether unreasonable, so as to impel the formulation of a new rule.

B. But even if this Court should regard with favor the proposed rule, the evidence in this case did not reach that degree of specificity which would have permitted the jury to determine that petitioner lacked the capacity to deliberate or to premeditate the homicide. The most that the evidence showed was that petitioner was the kind of person who was apt to conceive and carry into effect a murder because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter the ordinary man.

ARGUMENT

THERE WAS NO ERROR IN THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY THAT PETITIONER'S MENTAL AND EMOTIONAL CHARACTERISTICS, NOT AMOUNTING TO LEGAL INSANITY, SHOULD BE CONSIDERED BY THEM ON THE ISSUES OF DELIBERATION AND PREMEDITATION

In order to convict petitioner of murder in the first degree it was necessary under the statute (p. 2, *supra*) to establish that petitioner killed the deceased with deliberate and premeditated malice. Absent deliberation and premeditation, the killing would be murder in the second degree. Petitioner argues (Pet. 2, 5, 12–16) that his "psychiatric aggressive tendencies, low emotional response and borderline mental deficiency" although concededly insufficient to justify his complete acquittal on the ground of insanity, should, nevertheless, have been submitted to the jury under appropriate instructions for their consideration in determining whether the killing had been committed deliberately and premeditatedly, as required to establish murder in the first degree, or whether he was guilty only of second degree murder. On this basis, he contends, as we understand it, that the trial court committed reversible error in refusing to grant his requested instruction No. 6, i. e., that on the issues of deliberation and premeditation and whether he was of "sound memory and discretion," the jury "should consider the entire personality of the

defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case" (see pp. 12–13, *supra*).

In dealing with this matter, the court below ruled that the instruction was properly refused because it confused the issue of petitioner's sanity in the legal sense with the question of the effect of mental weakness not measuring up to legal insanity, i. e., "whether the psychopathic characteristics of the [petitioner] prevented him from forming the deliberate intent necessary to constitute first degree murder" (R. 116–117).[7] The

[7] It appears to us plain that the instruction was defective for the reason stated by the court below, and also because it did not tell the jury whether the effect of a finding favorable to petitioner on the question of deliberation and premeditation should result in complete absolution or would permit consideration of responsibility for a lesser degree of homicide. It is perhaps questionable whether it was the duty of the trial judge to recast the instruction. But we do not urge that as a basis for sustaining the judgment below. The Circuit Court of Appeals for the Ninth Circuit has held that, in murder cases, a requested instruction, although in part erroneous, imposes the duty on the trial judge to recast the instruction in proper form. *Freihage* v. *United States*, 56 F. 2d 127, 133; *Armstrong* v. *United States*, 41 F. 2d 162, 163. In other criminal cases, it has held that the judge is under no duty to recast an erroneous instruction. *Timell* v. *United States*, 5 F. 2d 901, 902. Several other circuits, as well as the Court of Appeals for the District of Columbia, follow this rule. *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); *Kreiner* v. *United States*, 11 F. 2d 722, 731 (C. C. A. 2), certiorari denied, 271 U. S. 688; *Bergera* v. *United States*, 297 Fed. 102, 113 (C. C. A. 8);

court then went on to say that even if the instruction had been phrased properly, there was no evidence justifying the instruction, since "With respect to the issue of deliberation the psychiatric testimony went no further than to say that [petitioner] was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes" (R. 117).[8]

Tillery v. *United States*, 285 Fed. 119 (C. C. A. 5); *Watlington* v. *United States*, 233 Fed. 247, 249 (C. C. A. 8), certiorari denied, 242 U. S. 645; *Blanton* v. *United States*, 213 Fed. 320, 326 (C. C. A. 8). The Circuit Court of Appeals for the Sixth Circuit has held in a mail fraud case that where a requested instruction on an important issue was defective so as technically to justify its refusal, the defect did not relieve the trial court from properly charging the jury on that issue. *McDonald* v. *United States*, 241 Fed. 793, 798–799.

[8] We assume that by the last sentence and by the succeeding paragraph of the opinion, concluding with the sentence, "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law" (R. 117), the court was in effect rejecting petitioner's contention that mental weakness could be utilized to reduce the

Petitioner rests his contention primarily upon the decision of this Court in 1881 in *Hopt* v. *People*, 104 U. S. 631. There the defendant had been convicted in the Territory of Utah of murder in the first degree, which was defined by the Utah Code as follows: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing * * * is murder in the first degree." The Utah Code also provided that while voluntary intoxication was not a defense to crime, "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that

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degree of the homicide. The proceedings in the trial court had made it clear that petitioner was not seeking a complete absolution but was claiming that because of his mental condition he could be guilty of not more than second-degree murder, and that the trial court rejected that claim (see R. 11–12, 64–69; compare also the petition for rehearing below, R. 119–120). Moreover, in 1886 the Supreme Court of the District of Columbia, sitting in General Term, held, on appeal, that no error was committed in the rejection of a quite analogous requested instruction, saying, "It rests upon the idea that there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder. The law does not recognize any such distinction as that in the forms of insanity." *United States* v. *Lee*, 15 D. C. (4 Mackey) 489, 495–496. It should be mentioned, however, that at that time the District of Columbia statute did not provide for degrees of murder.

the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." The trial court refused to instruct the jury that they were entitled to consider the defendant's intoxication upon the question "whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime." This Court held that the refusal to give the instruction was error, saying, "when a statute * * * requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury" (104 U. S. at 634).[9] Peti-

[9] The *Hopt* case was referred to in *Tucker* v. *United States*, 151 U. S. 164, and *Winston* v. *United States*, 172 U. S. 303, 311. In the *Tucker* case it was said that the *Hopt* case "went no further in favor of admitting evidence of intoxication than to hold that a defendant, indicted under a territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation" (151 U. S. at 169).

The majority of courts, including those of the District of Columbia, follow the rule on intoxication enunciated in the *Hopt* case. See *McAffee* v. *United States*, 111 F. 2d 199, 205 (App. D. C.), certiorari denied, 310 U. S. 643; *Bishop* v. *United States*, 107 F. 2d 297, 301 (App. D. C.); *State* v. *Kupis*, 37 Del. 27, 30–31 (1935); *State* v. *Wilson*, 11 N. W. 2d 737 (Ia., 1943); *Tate* v. *Commonwealth*, 258 Ky. 685, 695 (1935); *Com-*

tioner argues that "if intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect" (Pet. 14).

Our position is as follows: (A) While there are several considerations which may be advanced for the proposition that mental weakness or impairment, not amounting to insanity in the legal sense, should be permitted to be utilized for the purpose of reducing first-degree murder to a lesser degree of homicide, there are, on the other hand, factors which at the present time outweigh, in our opinion, those considerations; and (B), even if this Court should feel that mental weakness may be utilized to reduce the

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monwealth v. *Soaris*, 275 Mass. 291, 299–300 (1931); *People* v. *Koerber*, 244 N. Y. 147, 151 (1926); *People* v. *Leonardi*, 143 N. Y. 360, 366 (1894); *Commonwealth* v. *Kline*, 341 Pa. 238, 240 (1941); *Commonwealth* v. *Lehman*, 309 Pa. 486, 499 (1932); *Gills* v. *Commonwealth*, 141 Va. 445, 451 (1925); *Lasecki* v. *State*, 190 Wis. 274, 279–280 (1926). See also Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 90–91.

But the rule has been held not to permit a reduction of the crime to voluntary manslaughter. *Nestlerode* v. *United States*, 122 F. 2d 56, 59–60 (App. D. C.); *Commonwealth* v. *Soaris*, 275 Mass. 291, 299–300 (1931); *Commonwealth* v. *Taylor*, 263 Mass. 356, 363 (1928); *Cody* v. *Commonwealth*, 180 Va. 449, 452 (1942); *Gills* v. *Commonwealth*, 141 Va. 445, 451 (1925).

degree of a homicide, the evidence in this case does not call for the application of such a rule.

A. THIS COURT SHOULD NOT AT THIS TIME PERMIT MENTAL WEAKNESS, NOT AMOUNTING TO LEGAL INSANITY, TO REDUCE A FIRST DEGREE MURDER TO A LESSER DEGREE OF HOMICIDE

The legal tests of insanity warranting acquittal which have been embodied in instructions approved by this and other federal courts are as follows: (1) That the defendant's mental condition is so deranged by reason of mental disease that he is incapable of distinguishing between right and wrong; or (2) that he is unconscious of the nature of the act he has committed; or (3) that, while conscious of its nature and able to distinguish between right and wrong and to know that the act is wrong, yet his will has been so completely destroyed by mental disease that his actions are not subject to his will.[10]

Two modifications of these tests have been sought. One, which has been universally rejected by the courts of this country, is that the law should permit mental weakness or impairment which does not rise to the level of legal insanity

[10] See *Matheson* v. *United States*, 227 U. S. 540, 543; *Hotema* v. *United States*, 186 U. S. 413, 419; *Davis* v. *United States*, 165 U. S. 373, 378; *Holloway* v. *United States*, 148 F. 2d 665, 666 (App. D. C.); *Smith* v. *United States*, 36 F. 2d 548 (App. D. C.); *United States* v. *Fore*, 38 F. Supp. 140 (S. D. Calif.); cf. *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139, 150–151; *New York Life Ins. Co.* v. *King*, 93 F. 2d 347, 353–354 (C. C. A. 8).

to be utilized as a defense to criminal conduct."[11] In refusing to regard borderline mental unsoundness as an excuse for criminality, the courts have been motivated by two considerations: the protection of society against criminal offenders, and the difficulty of reconciling the point of view of

[11] *Holloway* v. *United States*, 148 F. 2d 665, 666 (App. D. C.); *Travers* v. *United States*, 6 App. D. C. 450, 464; *State* v. *Macias*, 60 Ariz. 93, 100 (1942); *Daniels* v. *State*, 186 Ark. 255, 259 (1932); *Chriswell* v. *State*, 171 Ark. 255, 259 (1926); *People* v. *Kimball*, 5 Cal. (2d) 608, 610 (1936); *People* v. *Dugger*, 5 Cal. (2d) 337, 341 (1936); *People* v. *Perry*, 195 Cal. 623, 639 (1925); *People* v. *Norton*, 138 Cal. App. 70, 74 (1934); *Rozier* v. *State*, 185 Ga. 317, 320–321 (1938); *Bowden* v. *State*, 151 Ga. 336, 338–340 (1921); *People* v. *Marquis*, 344 Ill. 261, 267 (1931); *Foster* v. *State*, 222 Ind. 133, 136–137 (1944); *McCutcheon* v. *State*, 199 Ind. 247, 259 (1927); *Wartena* v. *State*, 105 Ind. 445, 450 (1885); *State* v. *Flowers*, 58 Kan. 702, 705 (1897); *Cline* v. *Commonwealth*, 248 Ky. 609, 613 (1933); *State* v. *Tapie*, 173 La. 779, 787 (1931); *Commonwealth* v. *Devereaux*, 257 Mass. 391, 397 (1926); *Commonwealth* v. *Stewart*, 255 Mass. 9, 13 (1926); *State* v. *Pinski*, 163 S. W. 2d 785 (Mo., 1942); *State* v. *Jackson*, 346 Mo. 474, 481 (1940); *State* v. *Schlaps*, 78 Mont. 560, 578 (1927); *People* v. *Former*, 194 N. Y. 251, 265 (1909); *People* v. *Burgess*, 153 N. Y. 561, 569 (1897); *Patterson* v. *People*, 46 Barbour (N. Y.) 625, 633 (1866); *People* v. *Irwin*, 166 Misc. (N. Y.) 751, 754 (1938); *Commonwealth* v. *McCausland*, 348 Pa. 275, 277–278 (1944); *Commonwealth* v. *Szachewicz*, 303 Pa. 410, 416 (1931); *Commonwealth* v. *Cressinger*, 193 Pa. 326, 338 (1899); *Taylor* v. *Commonwealth*, 109 Pa. 262, 271 (1885); *Woodruff* v. *State*, 164 Tenn. 530, 547 (1932); *Banks* v. *State*, 133 Tex. Cr. Rep. 541, 542–543 (1938); *McKenny* v. *State*, 105 Tex. Cr. Rep. 353, 355 (1926); *Parker* v. *State*, 91 Tex. Cr. Rep. 68, 74 (1922); *State* v. *Schafer*, 156 Wash. 240, 252–253 (1930); *State* v. *Johnson*, 233 Wis. 668, 670–673 (1940).

the psychiatrist with the concept of responsibility which is foundational in our criminal law. The first consideration was thus expressed in *State* v. *Flowers*, 58 Kan. 702, 705 (1897): "Whenever moral weakness or an uncontrollable propensity to do wrong is accepted as an excuse for crime, there will be little room for conviction of offenders. No person of moral strength and a well-balanced mind commits crime. All wrong-doing is the result of ignorance and mental and moral defects. Yet society must protect itself and restrain the criminal classes."

The second consideration was stated in *Holloway* v. *United States*, 148 F. 2d 665, 667 (App. D. C.), by the author of the opinion below in the instant case, as follows:

> The modern science of psychology is concerned with diagnosis and therapeutics and not with moral judgments. It proceeds on an entirely different set of assumptions. It does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go. The tendency of psychiatry is to regard what ordinary men call reasoning as a rationalization of behavior rather than the real cause of behavior. From this point of view psychiatrists probe behind what ordinary men call the "reasoning" of an abnormal personality. This tends to restrict the area

of moral judgment to an extent that offends our traditional idea that an offender who can talk and think in rational terms is morally responsible for what he does.

And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane.

While modern criminologists apparently do not, in terms, urge that mental weakness should absolve completely of criminal responsibility, they fit the experience of modern psychiatry into the legal framework by applying it to the requirements of those crimes which involve a specific intent, particularly murder in the first degree, with its elements of "deliberation" and "premedi-

tation",[12] and, on this basis, advocates in the case of homicide an amelioration of the tests of criminal responsibility by holding the borderline defective culpable merely of some lesser degree of the crime. Their arguments in favor of the proposed rule may be summarized as follows:

(1) They say—and of course it cannot be disputed—that the legal concept that an offender is either wholly sane or wholly insane is unrealistic. The psychiatrists tell us, and common sense makes it evident, that the world cannot be carved into two parts, putting on the one side those who are sane and on the other those who are insane.[13]

[12] See Wharton, *Criminal Law* (12th ed.), vol. 1, sec. 64; Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 100–103; Weihofen, *Partial Insanity and Criminal Intent*, 24 Ill. Law Rev. 505 (1930); Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. of Pa. Law Rev. 426, 450 (1939); Keedy, *Insanity and Criminal Responsibility*, 30 Harv. Law Rev. 535, 552–554 (1917); Note, 79 U. of Pa. Law Rev. 209 (1930); Abrahamsen, *Crime and the Human Mind* (1944), p. 186; *Mental Abnormality and Crime*, *English Studies in Criminal Science* (1944), pp. 61–63; Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 199–208, p. 310, footnote 1.

[13] See White, *Insanity and the Criminal* Law (1923), p. 89: "To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil or is not possessed of a devil, and therefore is or is not a free moral agent." See also Hoag, *Crime, Abnormal Minds and the Law* (1923), p. 77; Healy, *The Individual Delinquent* (1917), p. 30; Grasset, *The Semi-Insane and the Semi-Responsible* (Eng. Transl. by Jelliffe, 1907), p. 349.

There are, the psychiatrists say, almost imperceptible graduations between the states of total sanity and total insanity."[14]

(2) More precisely, the penologists assert, based on the experience of psychiatry, that a person may be able to distinguish right from wrong, know that a particular act is morally reprehensible and legally punishable, and have will power enough so that he cannot be said to suffer from an irresistible impulse, and still be deficient in his powers of deliberation and judgment, or of inhibition and self-control. To permit jury consideration to be given to this deficiency is but another application of the principle which has long been part of our criminal law, the principle that circumstances may interfere with the ordinary operation of a person's mind and render him incapable of the mental state which the law will ordinarily imply from the act. In this respect they call attention to intoxication and "heat of blood", or provocation, which, when found to exist, may be taken into consideration by the jury, not as mitigating circumstances, but to show that the defendant, by reason of such intoxication or passion, was incapable of the specific intent required to constitute, with the given act, the higher crime.

(3) It is wholly illogical to permit intoxication to reduce the degree of crime and to exclude a

[14] See the authorities cited in footnote 12, *supra*, p. 26.

mental deficiency. Writing for the minority in *State* v. *Martin*, 102 N. J. L. 388, 403–404 (1926), Kalisch, J., said: "It is an abhorrent idea to contemplate that in a case of intoxication resulting, even from the voluntary act of the person; if by reason of such intoxication his mind is in such a state that he cannot form an intent to take life or to deliberate, or to premeditate, a jury should take that factor into consideration and may convict him of murder in the second degree, whilst if a person is afflicted with a mental disease, the act of God, a jury may not take that factor into consideration on the question of premeditation, deliberation, willfulness or intent, and must convict the defendant of murder in the first degree if he fails to satisfy the jury that his mental condition was such that at the time of the commission of the act he did not understand the nature of the act which he was doing, and was unable to distinguish right from wrong."

(4) The "partial insanity" doctrine is in accord with the precept of modern penology to make the punishment fit the criminal rather than the crime. Justice to the offender, it is argued, requires that the punishment should be proportioned not simply to the objective seriousness of the crime but also to the relative culpability of the criminal, taking into account all the mitigating circumstances, subjective as well as objective.

(5) Under the present legal tests of insanity, which do not permit individualization, the jury

will in most cases simply disregard the complex classifications of the degrees of murder and manslaughter and convict the defendant of that degree of crime which will subject him to what the jury thinks is the proper punishment in the light of elements which are legally irrelevant; indeed, they will often acquit the defendant where his case is one which appeals to the sympathy of the jury. The results are not only an illogical verdict when the case merits a scientific and logical verdict, but, more important, the danger to society which arises where, as a result of the jury's verdict, a mental defective is either released immediately or sooner than he should be.[15]

But the criminologists themselves admit that however logical may appear to be the adoption of the doctrine which they advocate, there are serious difficulties which would attend its acceptance. These and other objections, which we think outweigh the considerations for acceptance, may be summarized as follows:

(1) Not only would the jury have to determine the existence in the defendant of the borderline disorder, of itself not an easy task, but even if it could say with some degree of certainty that such

[15] These arguments, as well as various objections to the suggested rule, are in the main summarized in the article by Weihofen in 24 Ill. Law Rev. 505, and in his later book, "*Insanity as a Defense in Criminal Law*" (1933), pp. 100–103, 413–415.

a condition exists, it would then have to answer the still more difficult question whether such disorder rendered the defendant incapable of the specific intent required by the crime charged. It is conceded by proponents of the suggested rule that the bearing of the mental disorder upon the crime committed is not something which can be determined with any degree of precision; the most that can be expected is that there is a probability of connection between the crime committed and the mental condition.[16] Also, it is difficult to conceive how a defendant may be able to distinguish right from wrong, know that a particular act is reprehensible morally and legally, and have the will to resist the commission of the act, and still

[16] See Weihofen, 24 Ill. Law. Rev., p. 513, and also footnote 23 on the same page. Indeed, in footnote 48, on pp. 521–522 of his article, Weihofen, referring to Garofalo's "Criminology" (Eng. Trans. by Millar (1924), p. 273 et seq.), states: "It is impossible, he insists, to distinguish what act is the result of circumstances, environment or heredity and what is the result of free will. To determine this question, we should not only have to know his [the defendant's] whole life history, in all its intimate details, but also that of his ancestors, and in addition, we should have to examine the structure of his brain, which is possible only by an autopsy." Professor Hall in his recent article, *Mental Disease and Criminal Responsibility*, 45 Col. Law Rev. 677, 683 (1945), states: "* * * the chief limitation on any solution of the problems arising from mental disease is the lack of medical and psychiatric knowledge of mental disease"; and Dr. Abrahamsen in his book, *Crime and the Human Mind* (1944), p. 26, states, "there has been no real psychiatric insight into criminalistic behavior."

not have enough judgment to "premeditate" or "deliberate." Cf. *Commonwealth* v. *Wireback,* 190 Pa. 138, 151–152 (1899).

(2) The analogies to intoxication and provocation, which the criminologists use as a lever, both arise out of objective facts, drinking and adequate basis for anger or fury, matters easily comprehended by a jury, whereas mental weakness is purely a subjective condition, at all times difficult to prove and frequently giving rise to such a diversity of expert opinion as to result in nothing but confusion.

(3) The suggested rule, as is pointed out by the court below at R. 117, acquits of murder in the first degree the very type of person who is most apt to commit such a crime, i. e., the person with psychiatric aggressive tendencies and a low emotional response to situations which would deter the ordinary man. See *Sindram* v. *People,* 88 N. Y. 196, 201 (1882).

(4) If adopted, there is no logical reason why the proposed rule should be restricted to murder in the first degree, with its elements of premeditation and deliberation. It should be extended to those other degrees of homicide which require some evil purpose and, indeed, to any crime which requires a specific intent. Concededly the effect of the adoption of any such rule upon our criminal law would be revolutionary, and would re-

sult, additionally, in turning loose upon society the borderline mental deficient immediately or at least sooner than a sane, and perhaps less dangerous, criminal. This, the criminologists admit, would require the devising of new methods, not now embodied in our law, for the treatment and punishment of the borderline defective.[17]

(5) This Court is not ordinarily moved to impose a new rule unless the old one is outmoded and unreasonable. Cf. *Funk* v. *United States*, 290 U. S. 371, 381; *Weiler* v. *United States*, 323 U. S. 606, 609–610. In view of the present state of the authorities on the precise question, it can hardly be said that this is so. In addition to the present case there are some 48 American de-

[17] In his article in 24 Ill. Law Rev. at p. 526, Weihofen states: "This treatment * * * should not end with the expiration of the period of sentence. To release such an unbalanced criminal after he has served his term would be about as logical as to order a smallpox patient to the hospital for two weeks, and then turn him out, whether cured or not. After the partially insane criminal has been detained in prison (or as suggested above, in some half-way institution for such cases, or special ward connected with the prison) for the term of his sentence, he should be retained as a patient dangerous to be at large, either under indeterminate or permanent segregation.

"That scientific treatment and detention of these borderline cases must be continued after sentence has expired cannot be too strongly emphasized. Without such procedure, the social result of the doctrine would only be to speed up the 'in again, out again' record of psychopathic habitual criminals * * * ".

cisions dealing with the subject. In 27 of them the suggested rule has been rejected;[18] in 21 of them it has been accepted, although some of the decisions are not too clear.[19] As to the jurisdictions, it would seem that 9 have rejected the pro-

[18] *United States* v. *Lee*, 15 D. C. (4 Mackey) 489, 495–496 (1886); *Foster* v. *State*, 37 Ariz. 281, 289–290 (1930); *Bell* v. *State*, 120 Ark. 530, 557–558 (1915); *People* v. *French*, 12 Cal. 2d 720, 738 (1939); *People* v. *Cordova*, 14 Cal. (2d) 308, 312–313 (1939); *People* v. *Troche*, 206 Cal. 35, 47 (1928); *State* v. *Van Vlack*, 57 Idaho 316, 360–367 (1937); *Sage* v. *State*, 91 Ind. 141, 144–145 (1883); *Perciful* v. *Commonwealth*, 212 Ky. 673, 678 (1925); *Spencer* v. *State*, 69 Md. 28, 41–43 (1888); *Commonwealth* v. *Cooper*, 219 Mass. 1, 5 (1914); *State* v. *Paulsgrove*, 203 Mo. 193, 206 (1907); *State* v. *Holloway*, 156 Mo. 222, 231 (1900); *State* v. *Rodia*, 132 N. J. L. 199 (1944); *State* v. *Noel*, 102 N. J. L. 659, 676–677 (1926); *State* v. *Martin*, 102 N. J. L. 388, 402–404 (1926); *State* v. *James*, 96 N. J. L. 132 (1921); *State* v. *Maiorana*, 78 N. J. L. 339 (1909); *Sindram* v. *People*, 88 N. Y. 196, 200–201 (1882); *Commonwealth* v. *Barner*, 199 Pa. 335, 342 (1901); *Commonwealth* v. *Hollinger*, 190 Pa. 155, 160 (1899); *Commonwealth* v. *Wireback*, 190 Pa. 138, 151–152 (1899); *Jacobs* v. *Commonwealth*, 121 Pa. 586, 592–593 (1888); *Commonwealth* v. *Scott*, 14 Penna. District & County Rep. 191 (1930); *Witty* v. *State*, 75 Tex. Cr. Rep. 440, 457 (1914); *Hogue* v. *State*, 65 Tex. Cr. Rep. 539, 542 (1912); *State* v. *Schneider*, 158 Wash. 504, 510–511 (1930).

[19] *State* v. *Saxon*, 87 Conn. 5, 14–15 (1913); *Andersen* v. *State*, 43 Conn. 514, 526 (1876); *State* v. *Johnson*, 40 Conn. 136, 143–144 (1873); *Fisher* v. *People*, 23 Ill. 283, 295 (1860); *Donahue* v. *State*, 165 Ind. 148, 156 (1905); *Aszman* v. *State*, 123 Ind. 347, 356 (1889); *Maulding* v. *Commonwealth*, 172 Ky. 370, 380 (1916); *Rogers* v. *Commonwealth*, 96 Ky. 24, 28 (1894); *Mangrum* v. *Commonwealth*, 19 Ky. Law Rep. 94 (1897); *Commonwealth* v. *Clark*, 292 Mass. 409, 414 (1935); *Commonwealth* v. *Trippi*, 268 Mass. 227, 231 (1929); *State* v. *Close*, 106

posed rule: District of Columbia, Arizona, Arkansas, California, Idaho, Maryland, Missouri, Texas, and Washington. It would also seem that New Jersey and Pennsylvania have rejected the rule; Indiana, Kentucky, Massachusetts, and New York are in a doubtful category. On the other hand, the rule appears to have been accepted in Connecticut, Illinois Rhode Island, Utah, Virginia,

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N. J. L. 321, 324 (1930); *State* v. *Schilling*, 95 N. J. L. 145, 148 (1920); *People* v. *Moran*, 249 N. Y. 179, 180 (1928); *Jones* v. *Commonwealth*, 75 Pa. 403, 408 (1874); *State* v. *Fenik*, 45 R. I. 309, 315 (1923); *State* v. *Green*, 78 Utah 580, 602 (1931); *State* v. *Anselmo*, 46 Utah 137, 145, 157 (1915); *Dejarnette* v. *Commonwealth*, 75 Va. 867, 880–881 (1881); *Oborn* v. *State*, 143 Wis. 249, 272 (1910); *Hempton* v. *State*, 111 Wis. 127, 135 (1901).

We have discovered no English cases on the subject. It is stated in Halsbury's *Laws of England* (2d ed.) Vol. 9, p. 22: "Insanity is not an absolute defence in the case of a person charged with a crime. If insanity is proved in such a case, a jury cannot now, as they could formerly, acquit the accused, but they may bring in a special verdict that he was guilty of the act or omission charged against him, but was insane at the time when the act was done or the omission made. The result of this verdict is that the Court orders the accused to be kept in custody as a criminal lunatic, till the King's pleasure is known." The Scotch courts hold that a weak or diseased state of mind not amounting to insanity may be considered by the jury to reduce a killing from murder to culpable homicide. See *H. M. Advocate* v. *Muir* (1933) S. L. T. R. 403; *H. M. Advocate* v. *Savage*, 61 S. L. R. 12 (1923); *H. M. Advocate* v. *Edmonstone*, 47 S. L. R. 7 (1909); *H. M. Advocate* v. *Ferguson*, 19 S. L. R. 341 (1882); *H. M. Advocate* v. *Granger*, 16 S. L. R. 253 (1878).

and Wisconsin.[20] Some of the courts which have rejected the suggested rule have not been persuaded by the intoxication analogy upon which the criminologists place such strong reliance. See *Spencer* v. *State*, 69 Md. 28, 41–42 (1888); *State* v. *Noel*, 102 N. J. L. 659, 676–677, 693–694 (1926); *State* v. *James*, 96 N. J. L. 132, 152 (1921); *Commonwealth* v. *Hollinger*, 190 Pa. 155, 160–161 (1899); *Commonwealth* v. *Scott*, 14 Pa. District & County Rep. 191, 198 (1930).

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[20] Weihofen, writing in 1933, stated that the broader view "seems to have been adopted in some eight or nine states [Connecticut, Indiana, New Jersey, New York (dictum), Rhode Island, Tennessee, Utah, Virginia, Wisconsin]. The rule has been rejected in seven jurisdictions [Arkansas, California, District of Columbia, Massachsetts, Missouri, Pennsylvania, Washington], and three others are doubtful [Illinois, Kentucky, Texas]. *Insanity as a Defense in Criminal Law*, pp. 100–101. Glueck in 1925 recognized only two states, New Jersey and Utah, as adopting the broader view. Glueck, *op. cit.*, p. 203. Miller, *Criminal Law*, p. 134 (1934) states: "Most courts * * * have refused to consider 'mere weakness of mind' as an excuse for crime or to reduce the degree of crime."

The first of the two Wisconsin decisions which enunciated the rule, *Hempton* v. *State*, 111 Wis. 127, was predicated largely upon the language of this Court in the *Hopt* case, 104 U. S. 631, which referred to "drunkenness or otherwise" (see *supra* p. 20). The Wisconsin court apparently assumes that this Court was speaking of any circumstance which produced a disordered intellect, including mental deficiency. However, it should be noted that in the *Hopt* case the precise condition involved was drunkenness.

Although no objection as to the form of these instructions is urged here by counsel for petitioner, this Court in a criminal case may notice material error within its power to correct even though that error is not specifically challenged and certainly should do

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not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter, according as you may find he acted with or without malice.

"Insanity, according to the criminal law, is a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act. There must be actual disease or defect of the mental faculties, so far impairing the reason or will that this test of sanity cannot be met, before one is relieved of his criminal act.

"The fatal actions must be traceable back to a diseased or deranged mentality."

Irresistible impulse. "Here it is contended that although the defendant may have understood what he was doing when he assaulted Miss Reardon, and may have known it was wrong, yet he was impelled by an irresistible impulse to do the violent acts which caused her death.

"If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong.

"If, as I have said, there was such lack of willpower and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough."

Malice; Deliberation; Premeditation. "I have stated that the indictment presents within its terms the three degrees of unlawful homicide—murder in the first degree, murder in the second degree, and manslaughter.

"I shall explain them in that order.

"Murder in the first degree is the killing of a human being purposely and with deliberate and premeditated malice. The crime involves these elements:

"First, the fatal act purposely done. Of that, nothing more need be said.

"Second, malice.

"Third, premeditation.

"Fourth, deliberation.

"All these are elements which go to constitute the crime of murder in the first degree. Therefore, each and all must be established by the evidence beyond a reasonable doubt.

"Malice is a basic element of murder in both the first and the second degrees.

"In common parlance, the word signifies feelings of anger, hatred, or illwill. Such feelings, may, of course, actuate the killing of a human being, and often do.

"However, the law has given to the term 'malice' a special meaning. It is the intentional doing of a wrongful act to the injury of another under circumstances which do not legally justify, or palliate the act.

"As applied to the crime of murder, malice is the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief.

"Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite

so, even in cases from the District of Columbia, where life is at stake. *Brasfield* v. *United States*, 272 U. S. 448; compare Rules 54(a)(1), 59, 52(b), Rules of Criminal Procedure. It is suggested by a dissent that these instructions, just quoted in note 3, did not bring "sharply and vividly to the jury's mind" the issue of premeditation; that they "consisted of threadbare generalities, a jumble of empty abstractions." We think the contention advanced is that the district judge should have specifically referred to the words of insult or have elaborated upon the details of the evidence in his charge with respect to premeditation. With such a requirement for instructions we do not agree. The evidence furnishes the factual basis for a jury's conclusion as to guilt and its degree, guided by the instructions of the court as to the law.[4] Premeditation and deliberation were defined carefully by the instructions. The contention of the accused that there was no deliberation or premeditation was called distinctly to the jury's attention. The necessary time element was emphasized and the jury was told that premeditation required a preconceived design to kill, a "second thought." With the evidence and the law before them the jury reached its verdict. The instructions, we think, were clear, definite, understandable and applicable to the facts developed by the testimony. We see no error in them.

The error claimed by the petitioner is limited to the refusal of one instruction. The jury might not have reached the result it did if the theory of partial responsibility[5] for his acts which the

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decision to kill. In short, premeditation is the formation of a specific intent to kill.

"Deliberation, that term of which you have heard much in the arguments, and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

"Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.

"The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued."

[4] Stilson *v.* United States, 250 U. S. 583, 588; Starr *v.* United States, 153 U. S. 614, 625; Arwood *v.* United States, 134 F. 2d 1007, 1011.

[5] The phrase is used herein to indicate responsibility for a lesser grade of offense. See Glueck, Mental Disorder and the Criminal Law (1925) 310, n. 1.

petitioner urges had been submitted. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation.[6] The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory.[7] This has long been the law of the District of Columbia.[8] This is made abundantly clear by *United States* v. *Lee*, 4 Mackey 489, 495. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.[9]

It is suggested that the *Lee* case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree.

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[6] The instruction requested reads as follows:

"The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

Our conclusion does not require that we pass upon whether the instruction was correct if petitioner's theory is sound, or whether, if incorrect, the judge should have recast the instruction in proper form. See the case below, 149 F. 2d 28, 29 n. c. Compare Freihage v. United States, 56 F. 2d 127, 133, with George v. United States, 125 F. 2d 559, 563.

[7] Fisher v. United States, 149 F. 2d 28, 29 l. c.

The Court of Appeals spoke of an acquittal under the proposed instruction. The other language of the opinion and the refusal of the petition for rehearing, which pointed out the misuse of the word, shows clearly that a reduction in degree was meant, not an acquittal.

[8] Cf. Guiteau's Case, 10 Fed. 161, 168, 182; Bolden v. United States, 69 F. 2d 121; Owens v. United States, 85 F. 2d 270, 272.

[9] 4 Mackey 495-96:

The instruction requested was: "'If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter.'"

The court said: "It rests upon the idea that there is a grade of insanity

The separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, March 3, 1901, 31 Stat. 1189, 1321, is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. *Davis* v. *Utah Territary*, 151 U. S. 262, 267, 270. Homicide, at common law, the rules of which were applicable in the District of Columbia, had degrees. Murder was "with malice aforethought, either express or implied." *Hill* v. *United States*, 22 App. D. C. 395, 401; *Hamilton* v. *United States*, 26 App. D. C. 382, 386-91; *Burge* v. *United States*, 26 App. D. C. 524, 527-30. Manslaughter was unlawful homicide without malice. Blackstone, Book IV, p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here,[10] it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia.[11] As shown by the action of the District of Columbia courts in this case and the other District cases cited in this and the

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not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

"The law does not recognize any such distinction as that in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

"Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it."

[10] See Hart v. United States, 130 F. 2d 456, 458; Bishop v. United States, 107 F. 2d 297, 302-3; McHargue v. Commonwealth, 231 Ky. 82; State v. Eaton, 154 S. W. 2d 767 (Mo.).

[11] The reference to the establishment of degrees of murder in Hopt v. People, 104 U. S. 631, 634, may indicate a different point of view. The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense.

preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it.[12] It is urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee* v. *United States*, 111 F. 2d 199, 205 r. c.), courts from this must deduce that disease and congenital defects, for which the accused may not be responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in lan-

[12] We are indebted to the respondent's brief for the collection of cases. Those accepting the petitioner's theory are: Andersen v. State, 43 Conn. 514, 526 (1876); State v. Johnson, 40 Conn. 136, 143-44 (1873); Fisher v. People, 23 Ill. 283, 295 (1860); Donahue v. State, 165 Ind. 148, 156 (1905); Aszman v. State, 123 Ind. 347, 356 (1889); Rogers v. Commonwealth, 96 Ky. 24, 28 (1894); Mangrum v. Commonwealth, 19 Ky. Law Rep. 94 (1897); Commonwealth v. Trippi, 268 Mass. 227, 231 (1929); State v. Close, 106 N. J. L. 321, 324 (1930); State v. Schilling, 95 N. J. L. 145, 148 (1920); People v. Moran, 249 N. Y. 179, 180 (1928); Jones v. Commonwealth, 75 Pa. 403, 408, 410 (1874); State v. Green, 78 Utah 580, 602 (1931); State v. Anselmo, 43 Utah 137, 145, 157 (1915); Dejarnette v. Commonwealth, 75 Va. 867, 880-81 (1881); Hempton v. State, 111 Wisc. 127, 135 (1901).

Those rejecting it are: United States v. Lee, 15 D. C. (4 Mackey) 489, 495-96 (1886); Foster v. State, 37 Ariz. 281, 289-90 (1930); Bell v. State, 120 Ark. 530, 557-58 (1915); People v. French, 12 Cal. 2d 720, 738 (1939); People v. Cordova, 14 Cal. 2d 308, 311-12 (1939); People v. Troche, 206 Cal. 35, 47 (1928); State v. Van Vlack, 57 Idaho 316, 360-67 (1937); Sage v. State, 91 Ind. 141, 144-45 (1883); Spencer v. State, 69 Md. 28, 41-43 (1888); Commonwealth v. Cooper, 219 Mass. 1, 5 (1914); State v. Halloway, 156 Mo. 222, 231 (1900); State v. Rodia, 132 N. J. L. 199 (1944); State v. Noel, 102 N. J. L. 659, 676-77 (1926); State v. James, 96 N. J. L. 132, 149-51 (1921); State v. Maioni, 78 N. J. L. 339 (1909); Sindram v. People, 88 N. Y. 196, 200-201 (1882); Commonwealth v. Barner, 199 Pa. 335, 342 (1901); Commonwealth v. Hollinger, 190 Pa. 155, 160 (1899); Commonwealth v. Wireback, 190 Pa. 138, 151-52 (1899); Jacobs v. Commonwealth, 121 Pa. 586, 592-93 (1888); Commonwealth v. Scott, 14 Penna. District & County Rep. 191 (1930); Witty v. State, 75 Tex. Cr. Rep. 440, 457 (1914); Hogue v. State, 65 Tex. Cr. Rep. 539, 542 (1912); State v. Schneider, 158 Wash. 504, 510-11 (1930).

guage which has been said to be broad enough to cover mental deficiency. *Hopt* v. *People*, 104 U. S. 631, 634.[13] It should be noted, however, that the Territory of Utah had a statute specifically established such a rule.[14]

No one doubts that there are more possible classifications of mentality than the sane and the insane. White, Insanity and the Criminal Law 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.[15] Congress took a forward step in defining the degrees of murder so that only those guilty of deliberate and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility.

We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter

[13] 104 U. S. at 634: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

See Edwin R. Keedy, Insanity and Criminal Responsibility, 30 Harv. L. Rev. 535 at 552.

The cases cited by this Court to support this statement are all instances of intoxication. Since drunkenness alone is specifically mentioned, the "or otherwise" may refer to various stages of intoxication.

[14] See 104 U. S. 631 at 634.

[15] Wharton, Criminal Law (12 ed.), vol. 1, sec. 64; Weihofen, Insanity as a Defense in Criminal Law (1933), pp. 100-103; Weihofen, Partial Insanity and Criminal Intent, 24 Ill. Law Rev. 505 (1930); Keedy, Insanity and Criminal Responsibility, 30 Harv. Law Rev. 535, 552-554 (1917); Mental Abnormality and Crime, English Studies in Criminal Science (1944), pp. 61-63; Glueck, Mental Disorder and the Criminal Law (1925), pp. 199-208; Hall, Mental Disease and Criminal Responsibility, 45 Col. Law Rev. 677 (1945).

peculiarly of local concern. Compare *McNabb* v. *United States*, 318 U. S. 332, with *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156. This Court has in a less important matter undertaken to adjust by decision an outmoded rule of the common law to modern conditions. But when that step was taken, it was declared that "experience has clearly demonstrated the fallacy or unwisdom of the old rule." *Funk* v. *United States*, 290 U. S. 371, 381. See *Weiler* v. *United States*, 323 U. S. 606, 609.

Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5. The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER dissenting.

A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt. It is not enough that a trial goes through the forms of law. Especially where life is at stake it is requisite that the trial judge should so guide the jury that the jurors may be equipped to determine whether death should be the penalty for conduct. Of course society must protect itself. But surely it is not self-protection for society to take life without the most careful observance of its own safeguards against the misuse of capital punishment.

This case has been much beclouded by laymen's ventures into psychiatry. We are not now called upon to decide whether the antiquated tests set down more than a hundred years ago regard-

ing mental responsibility for crime[1] are still controlling or whether courts should choose from among the conflicting proposals of scientific specialists.[2] This is not the occasion to decide whether the only alternative is between law which reflects the most advanced scientific tests and law remaining a leaden-footed laggard. The case turns on a much simpler and wholly conventional issue. For the real question, as I see it, is whether in view of the act of Congress defining murder in the first degree for prosecutions in the District and in light of the particular circumstances of this case, the trial court properly sent the case to the jury. That is a very different question from whether the court's charge was unimpeachable as an abstract statement of law. For Fisher is not the name of a theoretical problem. We are not here dealing with an abstract man who killed an abstract woman under abstract circumstances and received an abstract trial on abstract issues. Murder cases are apt to be peculiarly individualized, and this case has its own distinctive features. It is in the light of these that we must decide whether Fisher's death-sentence should legally stand.

According to the more enlightened rule appellate courts may review the facts in a capital case.[3] Were such the scope of our review of death sentences, I should think it would be hard to escape what follows as the most persuasive reading of the record.

Fisher had learned from his boss of Miss Reardon's complaint about the slackness of his work. On the fatal morning, Miss

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[1] *Regina* v. *M'Naghten*, 10 Cl. & F. 200 (1843). More than sixty years ago Sir James Fitzjames Stephen brought weighty criticism to bear on the *M'Naghten* case. 2 Stephen, *A History of the Criminal Law of England* (1883) 153 *et seq.*; for more recent consideration of the case, see Glueck, *Mental Disorder and the Criminal Law* (1925) c. 6; Cardozo, *What Medicine Can Do For Law* (1930) 28-35.

[2] See, *e. g.*, White, *Insanity and the Criminal Law* (1923); Abrahamsen, *Crime and the Human Mind* (1944); Lindner, *Rebel Without A Cause* (1944); Radzinowicz & Turner, eds., *Mental Abnormality and Crime* (1944); Reik, *The Unknown Murderer* (1945); see also, Hall, *Mental Disorders and Criminal Responsibility* (1945) 45 Col. L. Rev. 677, 680-84, and authorities cited therein.

[3] See, *e. g.*, Annotated Laws of Massachusetts, c. 278, § 33 E; *Commonwealth* v. *Gricus*, 317 Mass. 403, 406; *Massachusetts Judicial Council, Third Report* (1927) 40-43, 131-35; *Massachusetts Judicial Council, Thirteenth Report* (1937) 28-30; New York Constitution, Article 6, § 7; *People* v. *Crum*, 272 N. Y. 348; Cardozo, *Jurisdiction of the Court of Appeals* (2d ed., 1909) § 51; American Law Institute, *Code of Criminal Procedure* (Official Draft, 1930) § 457(2); Orfield, *Criminal Appeals in America* (1939) 83 *et seq.*

The reasons for such review are succinctly stated in the *Thirteenth Report of the Massachusetts Judicial Council, supra*, at 29: "In substance this [denial of the right to consider the facts by the appellate court] means that there is

Furthermore, the problem, as it arises in this case, involves a question of local policy as to which the decision of the local appellate tribunal, which is in accord with the weight of authority, should be regarded as final, at least in the absence of compelling reasons for the adoption of a new principle. Cf. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

B. EVEN IF THE SUGGESTED RULE SHOULD BE REGARDED FAVORABLY, THE EVIDENCE DID NOT REACH THAT DEGREE OF SPECIFICITY WHICH WOULD HAVE PERMITTED THE JURY TO DETERMINE WHETHER PETITIONER LACKED THE CAPACITY TO DELIBERATE OR TO PREMEDITATE THE HOMICIDE

Counsel for petitioner, although advocating initially in the trial court the application of the "partial insanity" doctrine, seems, at the last, to have led the trial judge to believe that he would not insist upon that doctrine, by asserting that his expert evidence would demonstrate that petitioner was insane within the established legal concepts. That issue was fully submitted to the jury, its verdict was against petitioner (see pp. 13–14, *supra*), and he does not now urge that its verdict was erroneous in that respect. But, even if petitioner was entitled to insist upon an appraisal of his expert testimony from the standpoint of partial insanity, it would seem plain that the testimony did not rise to that degree of specificity that would have permitted the jury to determine

whether petitioner lacked the capacity to deliberate or to premeditate the homicide.

We think the evidence on these questions has been fairly appraised in the opinion of the court below: "With respect to the issue of deliberation the psychiatric testimony went no further than to say that [petitioner] was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men" (R. 117). The psychologist who testified for petitioner merely stated that he had a mental age of eleven years and four months (p. 8, *supra*). But there was no evidence that this precluded petitioner from deliberating or premeditating, or even affected his ability to premeditate and deliberate, and, indeed, the Government's psychiatrist testified that such a person had nearly the intellectual ability of a normal person (p. 12, *supra*). Petitioner's psychiatrist testified that petitioner was afflicted with various forms of mental disorder, but he said nothing as to whether these prevented petitioner from having the capacity to deliberate or premeditate. He did express a doubt whether petitioner could entertain an intent to commit the killing because of a deranged mental condition, but just how that derangement affected petitioner's powers of deliber-

ation and premeditation was left completely unexplained (pp. 10–11, *supra*). Accordingly, we submit that there was no evidence of probative value which would warrant submission to the jury of the questions whether petitioner was without the power to deliberate or to premeditate the homicide because of his mental and emotional characteristics.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER 1945.

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SUPREME COURT OF THE UNITED STATES.

No. 122.—October Term, 1945.

Julius Fisher, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 10, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings here for review the sentence of death imposed upon petitioner by the District Court of the United States for the District of Columbia after a verdict of guilty on the first count of an indictment which charged petitioner with killing by choking and strangling Catherine Cooper Reardon, with deliberate and premeditated malice. The United States Court of Appeals for the District of Columbia affirmed the judgment and sentence of the District Court. 149 F. 2d 28.

The errors presented by the petition for certiorari and urged at our bar were, in substance, that the trial court refused to instruct the jurors that they should consider the evidence of the accused's psychopathic aggressive tendencies, low emotional response and borderline mental deficiency to determine whether he was guilty of murder in the first or in the second degree. The aggregate of these factors admittedly was not enough to support a finding of not guilty by reason of insanity.[1] Deliberation and premeditation are necessary elements of first degree murder.

Considerations as to the exercise of authority by this Court over the courts of the District of Columbia in the interpretation of local criminal statutes induced us to grant the writ in view of the issue presented. Judicial Code, Section 240(a).

The homicide took place in the library building on the grounds of the Cathedral of Saint Peter and Saint Paul, Washington, D. C.,

[1] The Code of Law for the District of Columbia (1940 Ed.) provides as follows:

Title 22, section 2401, "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery,

between eight and nine o'clock, a.m., on March 1, 1944. The victim was the librarian. She had complained to the verger a few days before about petitioner's care of the premises. The petitioner was the janitor. The verger had told him of the complaint. Miss Reardon and Fisher were alone in the library at the time of the homicide. The petitioner testified that Miss Reardon was killed by him immediately following insulting words from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence. He then dragged her to a lavatory and left the body to clean up some spots of blood on the floor outside. While Fisher was doing this cleaning up, the victim "started hollering again." Fisher then took out his knife and stuck her in the throat. She was silent. After that he dragged her body down into an adjoining pump pit, where it was found the next morning. The above facts made up petitioner's story to the jury of the killing.

It may or may not have been accepted as a whole by the jury. Other evidence furnishes facts which may have led the jury to disbelieve some of the details of accused's version of the tragedy. In his original confession, the accused made no reference to Miss Reardon's use of insulting words. In his written confession, they were mentioned. In his testimony their effect upon him was amplified. There are minor variations between Fisher's written confession and his testimony. In the written confession Fisher admitted that his main reason for assaulting Miss Reardon was because she reported him for not cleaning the library floor. The Deputy Coroner said the knife wound was not deep, "just went through the skin."

The effort of the defense is to show that the murder was not deliberate and premeditated; that it was not first but second degree murder. A reading of petitioner's own testimony, summarized

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or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

Title 22, section 2403, "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

Title 22, section 2404, "The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

above, shows clearly to us that there was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. Cf. *Bostic* v. *United States*, 94 F. 2d 636, 638. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process. It is the contention of the defense that the mental and emotional qualities of petitioner were of such a level at the time of the crime that he was incapable of deliberation and premeditation although he was then sane in the usual legal sense. He knew right from wrong. See The M'Naghten Rules, 10 C. and F. 200, 210. His will was capable of controlling his impulses. *Smith* v. *United States*, 36 F. 2d 548. Testimony of psychiatrists to support petitioner's contention was introduced. An instruction charging the jury to consider the personality of the petitioner in determining intent, premeditation and deliberation was sought and refused.

From the evidence of the psychiatrists for the defense, the jury might have concluded the petitioner was mentally somewhat below the average with minor stigmata of mental subnormaley. An expert testified that he was a psychopathic personality[2] of a predominantly aggressive type. There was evidence that petitioner was unable by reason of a deranged mental condition to resist the impulse to kill Miss Reardon. All evidence offered by the defense was accepted by the trial court. The prosecution had competent evidence that petitioner was capable of understanding the nature and quality of his acts. Instructions in the usual form were given by the court submitting to the jury the issues of insanity, irresistible impulse, malice, deliberation and premeditation. Under these instructions, set out below the jury could have determined from the evidence that the homicide was not the result of premeditation and deliberation.[3]

[2] "The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran and Mallinson, Psychopathic Personality (1944), 90 J. Ment. Sci. 278.

[3] These instructions were given:

Insanity. "In behalf of the defendant, it is contended that he was insane, and therefore not legally responsible, hence should be acquitted by reason of insanity.

"It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if

Reardon told Fisher that he was not doing the work for which he was being paid, and in the course of her scolding called him a "black nigger." This made him angry—no white person, he claimed, had ever called him that—and he struck her. She ran screaming towards the window in the back of the room. Fisher ran out of the room and up the stairs. Her screaming continued. At the top of the stairs he saw a pile of wood lying by the fireplace. He seized a piece of wood, ran down the stairs and struck her on the head. The stick broke and he seized her by the throat. She continued to scream until she went limp. He then dragged her to the lavatory and left her there while he went back to clean up the spots of blood. She recovered sufficiently to scream again, and he returned to the lavatory and cut her slightly with a knife he carried in his pocket. The importance of the screaming is a key to the tragedy. It is difficult to disbelieve Fisher's account that he never wanted to kill Miss Reardon but wanted only to stop her screaming, which unnerved him.

"She ran out from behind her desk, down toward the back, screaming."

"The screaming seemed to have gotten on my nerves."

"I was running up on the steps, with her all the time screaming."

"She was still screaming and I began choking her then."

"I was just trying to keep her from making noise."

". . . she started hollering and I tried to stop her from hollering."

"Then I began choking her because she was still hollering."

". . . I did not strike her any more after the noise had ceased."

". . . she started hollering again."

"She kept hollering, seemed like to me."

"My idea was just trying to stop her from hollering, is all I can think about."

"After that she stopped hollering."

The next day he started to go to the Cathedral to work as usual. He made two attempts to enter the Cathedral grounds. About

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no review of the discretion of the single judge. Thus a matter of life or death, once treated [in Massachusetts] with the utmost care, even beyond the requirements of the law, has now been committed to a single judge of the Superior Court, with no review whatever on its most vital aspects. Such a situation places an unfair responsibility upon the trial judge and upon the governor, is a potential threat to justice, and is not reassuring to the public who have a right to demand that judicial considerations should be exhausted before a man is condemned to death."

the first, he said he got "nervous and shaky, and [he] couldn't go in there." Later he "kept thinking about what [he] had done to her. [He] didn't know whether she was dead or alive. [He] was afraid to go up there and tell them that [they] had had an argument or fight." When apprehended by two detectives he said, "I had some trouble with a lady out at the Cathedral."

The evidence in its entirety hardly provides a basis for a finding of premeditation. He struck Miss Reardon when she called him "black nigger." He kept on when her screaming frightened him. He did not know he had killed her. There is not the slightest basis for finding a motive for the killing prior to her use of the offensive phrase. Fisher, to be sure, had Miss Reardon's ring in his possession. But it came off in his hand while he was dragging her, and he put it away when he reached home to conceal its possession from his wife. He did not run away and he cleaned up the blood "because [he] did not want to leave the library dirty. leave awful spots on the floor, [he] wanted to clean them up." He treated the spots on the floor not as evidence of crime but as part of his job to keep the library clean. Fisher was curiously unconnected with the deed, unaware of what he had done. His was a very low grade mentality, unable to realize the direction of his action and its meaning. His whole behavior seems that of a man of primitive emotions reacting to the sudden stimulus of insult and proceeding from that point without purpose or design. Premeditation implies purpose and purpose is excluded by instantaneous action. Fisher's response was an instinctive response to provocation, and premeditation means nothing unless it precludes the notion of an instinctive and uncalculated reaction to stimulus. Accordingly, if existing practice authorized us to review the facts in a capital case I should be compelled to find that the ingredients of murder in the first degree were here lacking. I would have to find that the necessary premeditation and deliberation for the infliction of a death sentence were wanting, as did the New York Court of Appeals in a case of singularly striking similarity. *People* v. *Caruso*, 246 N. Y. 437. It is significant that the Court of Appeals for the District of Columbia has heretofore deemed it within its duty to examine the evidence in order to ascertain whether a finding of premeditation and deliberation was justified. *Bullock* v. *United States*, 122 F. 2d 213.

But while it is not now this Court's function to interpret the facts independently,[4] the jury, under guidance appropriate for a murder case, might well have so interpreted them because the facts are persuasively so interpretable. If, under adequate instructions, it could have so found, the homicide falls outside the requirements for a finding of murder in the first degree. Congress in 1901 enacted a code for the District in which it joined the growing movement of dividing murder into degrees.[5] Congress confined the death sentence to killing by premeditation; it required designed homicide, previous deliberation that life was to be taken before the United States would take life in retribution.[6]

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[4] As to certain classes of litigation that come here, this Court has, of course, always had power to review the evidence. *E. g.*, "[Since] by an appeal, except when specifically provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge." In re *Neagle*, 135 U. S. 1, 42.

[5] District of Columbia Code (1940) § 22-2401: "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in the perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

§ 22-2402: "Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree."

§ 22-2403: "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

[6] The legislative history of these sections is meagre. The separation of the crime of murder into two degrees seems to have been first proposed for the District in the Code of 1857. C. 130, §§ 1-2. That Code was never enacted by Congress. The present provisions are the result of a Code prepared by Judge Cox and enacted in 1901. 31 Stat. 1189, 1321. In an historical note that precedes the Code, Judge Cox stated that it was to have been based on the laws of Maryland. District of Columbia Code (1940 ed.) *xiv*. In a letter to the Washington Board of Trade, however, Judge Cox stated that the Code was based on the laws of Maryland, Virginia, New York, and Ohio. *Report of the Washington Board of Trade*, November 14, 1898, pp. 23-24. And the Washington *Law Reporter*, vol. 26, p. 201, states that the "portion of the work relating to crime and punishment follow the statutes of New York in creating degrees in the crime of murder." A comparison of the Code with the New York Penal Code of 1898, §§ 183, 183a, 184, bears out this statement, though the exact language of the New York statute was not adopted.

The reports of each of the four States, however, up to the time of the enactment of the District Code, indicates unanimity in one essential element. For a homicide to constitute murder in the first degree, the jury must find

The division of murder into degrees arose from the steadily weakened hold of capital punishment on the conscience of mankind. See Calvert, *Capital Punishment in the Twentieth Century* (5th ed.; 1936); *Report from the Select Committee of the House of Commons on Capital Punishment, and Minutes of Evidence* (1930). The crime of murder was divided into two classes, in some States very early,[7] in recognition of the fact that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. It is this consideration that has led most of the States to divide common law murder into two crimes, and Congress followed this legislation. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 703-704; Michael and Wechsler, *Criminal Law and Administration* (1940) 1269 *et seq.*

The bite of law is in its enforcement. This is especially true when careful or indifferent judicial administration has consequences so profound as does the application of legislation dividing murder into first and second degrees—consequences that literally make the difference between life and death. This places the guiding responsibility upon the trial court in no wise restricted by the course pursued by the defense. The preoccupation at the trial in the treatment of the conviction by the court below and by the arguments at the bar of this Court was with alluring problems of psychiatry. Throughout this melancholy affair the insistence was on claims of Fisher's mental deficiencies and the law's duty to

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in addition to the element of intent to kill, premeditation and deliberation. *E. g., Spencer* v. *State*, 69 Md. 28 (1888); *Leighton* v. *People*, 88 N. Y. 117 (1882); *People* v. *Majone*, 91 N. Y. 211 (1883); *People* v. *Conroy*, 97 N. Y. 62 (1884); *People* v. *Hawkins*, 109 N. Y. 408 (1889); *People* v. *Barberi*, 149 N. Y. 256 (1896); *Ohio* v. *Neil*, Tappan (Ohio) 120 (1817); *State* v. *Turner*, Wright (Ohio) 20 (1831); *State* v. *Gardner*, Wright (Ohio) 392 (1833); *State* v. *Thompson*, Wright (Ohio) 617 (1834); *Shoemaker* v. *State*, 12 Ohio 43 (1843); *Ohio* v. *Brooks*, 1 Ohio Dec. 407 (1851); *Fouts* v. *State*, 8 Ohio St. 98 (1857); *State* v. *Cook*, 2 Ohio Dec. 36 (1859); *Burns* v. *State*, 3 Ohio Dec. 122 (1859); *State* v. *Maxwell*, Dayton (Ohio) 362 (1867); *Zeltner* v. *State*, 32 Ohio C. C. 102 (1899); *Commonwealth* v. *Jones*, 1 Leigh. (Va.) 598 (1829); *Dejarnette* v. *Commonwealth*, 75 Va. 867 (1881); *Hite* v. *Commonwealth*, 96 Va. 489 (1898); *Jackson* v. *Commonwealth*, 97 Va. 762 (1899).

[7] Pennsylvania enacted this type of legislation in 1794. Pennsylvania Laws, 1794, c. 257, §§ 1-2. This early statute has served as the pattern upon which most legislative action with a similar purpose has been based. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. 701, 703-704; Michael and Wechsler, *Criminal Law and Administration* (1940) 1270-73. The District Code does not depart very far from the language of the original Pennsylvania statute; nor did the statute of the Territory of Utah construed by this Court in *Hopt* v. *People*, 104 U. S. 631, 632.

take into consideration the skeptical views of modern psychiatry regarding the historic legal tests for insanity. I cannot but believe that this has diverted attention from the more obvious and conventional but controlling inquiry regarding the absence or presence of the requisite premeditation, under the circumstances of this case.

That the charge requested by the defendant and denied did not go to this issue of premeditation unambiguously but in an awkward and oblique way did not lessen the responsibility of the trial judge to bring this issue—it was the crucial issue—sharply and vividly to the jury's mind. If their minds had been so focused, the jury might well have found that the successive steps that culminated in Miss Reardon's death could not properly be judged in isolation. They might well have found a sequence of events that constituted a single, unbroken response to a provocation in which no forethought, no reflection whatever, entered. A deed may be gruesome and not be premeditated. Concededly there was no motive for the killing prior to the inciting "you black nigger." The tone in which these words were uttered evidently pulled the trigger of Fisher's emotions, and under adequate instructions the jury might have found that what these words conveyed to Fisher's ears unhinged his self-control. While there may well have been murder, deliberate premeditation, for which alone Congress has provided the death sentence, may have been wanting.[8] "While it is unlikely that the jury would return

[8] Federal judges are not referees in sporting contests. Their duty to keep a trial in the course of justice is especially compelling where the penalty for conviction is death. The kind of guidance that a trial judge should give a jury in a case like this is well illustrated by Judge Andrews in *People* v. *Caruso*, 246 N. Y. 437. *E. g.*, "But was there premeditation and deliberation? . . . Time to deliberate and premeditate there clearly was. Caruso might have done so. In fact, however, did he?

"Until the Saturday evening Caruso had never met Dr. Pendola. Nothing occurred at that interview that furnished any motive for murder. Then came nervous strain and anxiety culminating in grief, deep and genuine, for the death of his child. Brooding over his loss, blaming the doctor for his delay in making the promised visit, believing he had killed the boy by his treatment, the doctor finally enters. And when, told of the child's death, he appears to laugh. This added to his supposed injuries would fully account for the gust of anger that Caruso says he felt. Then came the struggle and the homicide.

"As has been said, Caruso had the time to deliberate, to make a choice whether to kill or not to kill—to overcome hesitation and doubt—to form a definite purpose. And where sufficient time exists very often the circumstances surrounding the homicide justify—indeed require—the necessary inference. Not here, however. No plan to kill is shown, no intention of vio-

a verdict of murder in the first degree unless satisfied that the defendant, at the time he committed the offense was capable of entertaining the malicious intent, we cannot, in a case of this kind, speculate as to what considerations entered into their verdict." *Sabens* v. *United States*, 40 App. D. C. 440, 444. The same guiding consideration for reviewing a death sentence was pithily expressed the other day by the present Lord Chief Justice of England: "It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction." *Kwaku Mensah* v. *Rex*, [1946] A. C. 83, 94. In that case, the Privy Council found inadequacy in the direction given by the trial court on considerations that were not mentioned in the courts below nor raised by the appellant. Neither should we permit a death sentence to stand that raises such doubts as does Fisher's conviction on this record.

As I have already indicated, I do not believe that the facts warrant a finding of premeditation. But, in any event, the justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon.[9] The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease. What the jury got was devoid of clear guidance and illumination. Inadequate direction to a jury may be as fatal as misdirection. The observations made by this Court in a civil case are especially pertinent to the duty of a federal judge in a trial

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lence when the doctor arrived—only grief and resentment. Not until the supposed laugh did the assault begin. . . . The attack seems to have been the instant effect of impulse. Nor does the fact that the stabbing followed the beginning of the attack by some time affect this conclusion. It was all one transaction under the peculiar facts of this case. If the assault was not deliberated or premeditated then neither was the infliction of the fatal wound." 246 N. Y. at 445-46.

[9] ". . . It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

"In the Federal courts the common law doctrine on this subject has always held." Thayer, *Preliminary Treatise on Evidence* (1898) 188, n. 2.

for murder: " . . . it is the right and duty of the court to aid [the jury] . . . by directing their attention to the most important facts, . . . by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. . . . Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result." *Nudd* v. *Burrows*, 91 U. S. 426, 439.

Only the other day we exercised our supervisory responsibility over the lower federal courts to assure against the possibility of unfairness in the operation of the jury system in ordinary civil suits. *Thiel* v. *Southern Pacific Co.*, 328 U. S. —. By how much more should we guard against a fatal mishap where life is at stake. This Court in reviewing a conviction for murder in the federal courts ought not to be behind the House of Lords and the Privy Council in rejecting strangling technicalities. See *Mancini* v. *Director of Public Prosecutions*, [1942] A. C. 1, 7-8;[10] *Kwaku Mensah* v. *Rex*, *supra*. It should be guided, as was the Privy Council in the case of a lowly West African villager, by broad considerations of justice so as to avoid the mistake of affirming a death sentence which the

[10] "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex* v. *Hopper* [(1915) 2 K. B. 431], at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental; but Lord Reading C.J., in delivering the judgment of the Court of Criminal Appeal, said [*id.* at 435]: 'We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even though counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a ques-

jury may well not have returned had they had a direction that would have informed their understanding and guided their judgment. In the circumstances of this case failure to charge the jury adequately was to deny Fisher the substance of a fair trial.

Men ought not to go to their doom because this Court thinks that conflicting legal conclusions of an abstract nature seem to have been "nicely balanced" by the Court of Appeals for the District of Columbia. The deference which this Court pays to that Court's adjudications in ordinary cases involving issues essentially of minor or merely local importance seems out of place when the action of this Court, no matter how phrased, sustains a death sentence at the seat of our Government as a result of a trial over which this Court, by direction of Congress, has the final reviewing power. This Court cannot escape its responsibility for the death sentence if it affirms the judgment. One can only hope that even more serious consequences will not follow, which would be the case if the Court's decision were to give encouragement to doctrines of criminal law that have only obscurantist precedents of the past to recommend them. Moreover, a failure adequately to guide a jury on a basic issue, such as that of premeditation on a charge of murder in the first degree, does not reflect a "long established" practice, and one hopes will not become "deeply rooted," in the District.[11] Quite the contrary standard is indicated by an earlier opinion of the Court of Appeals. See *McAfee* v. *United States*, 105 F. 2d 21, 26.

The judgment should be reversed and a new trial granted.

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tion ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

[11] The only authority adduced for what the Court terms long established practice is *United States* v. *Lee*, 4 Mackey (D. C.) 489 (1886). But that case was decided while common law murder was the law of the District. The enactment of the Code rendered that case's doctrine invalid. Counsel for the Government, a distinguished lawyer, Mr. A. S. Worthington, pointed to the distinction in his argument: "In jurisdictions where murder is divided into two degrees—murder in the first degree requiring deliberation and premeditation; in other words, actual malice—it has been frequently held that evidence of mental excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter." *Id.* at 493. The change wrought by Congress is reflected in *Sabens* v. *United States*, 40 App. D. C. 440; *Bishop* v. *United States*, 107 F. 2d 297; *Bullock* v. *United States*, 122 F. 2d 213, 214.

Mr. Justice MURPHY, dissenting.

As this case reaches us, we are not met with any question as to whether petitioner killed an individual. That fact is admitted. Our sole concern here is with the charge given to the jury concerning the elements entering into the various degrees of murder for which petitioner could be convicted.

The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice.

In the past this Court has seen fit to determine various common law issues affecting only the District of Columbia. *Aldridge* v. *United States*, 283 U. S. 308; *Reed* v. *Allen*, 286 U. S. 191; *Best* v. *District of Columbia*, 291 U. S. 411. It has also, on occasion, settled issues involving the interpretation of provisions of the District of Columbia Code. *Washington Fid. Ins. Co.* v. *Burton*, 287 U. S. 97; *Loughran* v. *Loughran*, 292 U. S. 216; *District of Columbia* v. *Murphy*, 314 U. S. 441. In many respects, however, the problem in this instance far transcends the ones presented in those cases.

Here we have more than an exercise in statutory construction or in local law. It is a capital case involving not a question of innocence or guilt but rather a consideration of the proper standards to be used in judging the degree of guilt. What the Court says and decides here today will affect the life of the petitioner as well as the lives of countless future criminals in the District and in the various states. However guarded may be the Court's statements, its treatment of petitioner's claims will have inevitable repercussions in state and federal criminal proceedings. Moreover, these claims, whatever their merit, afford a rare opportunity to explore some of the frontiers of criminal law, frontiers that are slowly but undeniably expanding under the impact of our increasing knowledge of psychology and psychiatry. These factors are more than sufficient to warrant a full and careful consideration of the problems raised by this case.

The issue here is narrow yet replete with significance. Stated briefly, it is this: May mental deficiency not amounting to complete insanity properly be considered by the jury in determining

whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder? The correct answer, in my opinion, was given by this Court more than sixty years ago in *Hopt* v. *People*, 104 U. S. 631, 634, when it said, "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." (Italics added.)

The existence of general mental impairment, or partial insanity, is a scientifically established fact. There is no absolute or clear-cut dichotomous division of the inhabitants of this world into the sane and the insane. "Between the two extremes of 'sanity' and 'insanity' lies every shade of disordered or deficient mental condition, grading imperceptibly one into another." Weihofen, "Partial Insanity and Criminal Intent," 24 Ill. L. Rev. 505, 508.

More precisely, there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder. Yet under the rule adopted by the court below, the jury must either condemn such persons to death on the false premise that they possess the mental requirements of a first degree murderer, or free them completely from criminal responsibility and turn them loose among society. The jury is forbidden to find them guilty of a lesser degree of murder by reason of their generally weakened or disordered intellect.

Common sense and logic recoil at such a rule. And it is difficult to marshal support for it from civilized concepts of justice or from the necessity of protecting society. When a man's life or liberty is at stake he should be adjudged according to his personal culpability as well as by the objective seriousness of his crime. That elementary principle of justice is applied to those who kill while intoxicated or in the heat of passion; if such a condition destroys their deliberation and premeditation the jury may properly consider that fact and convict them of a lesser degree of murder. No different principle should be utilized in the case of those whose mental deficiency is of a more permanent character. Society, moreover, is ill-protected by a rule which encourages a jury to acquit a partially insane person with an appealing case simply

because his mental defects cannot be considered in reducing the degree of guilt.

It is undeniably difficult, as the Government points out, to determine with any high degree of certainty whether a defendant has a general mental impairment and whether such a disorder renders him incapable of the requisite deliberation and premeditation. The difficulty springs primarily from the present limited scope of medical and psychiatric knowledge of mental disease. But this knowledge is ever increasing. And juries constantly must judge the baffling psychological factors of deliberation and premeditation, Congress having entrusted the ascertainment of those factors to the good sense of juries. It seems senseless to shut the door on the assistance which medicine and psychiatry can give in regard to these matters, however inexact and incomplete that assistance may presently be. Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy.

It is also said that the proposed rule would require a revolutionary change in criminal procedure in the District of Columbia and that this Court should therefore leave the matter to local courts or to Congress. I cannot agree. Congress has already spoken by making the distinction between first and second degree murder turn upon the existence of deliberation and premeditation. It is the duty of the courts below to fashion rules to permit the jury to utilize all relevant evidence directed toward those factors. But when the courts below adopt rules which substantially impair the jury's function in this respect, this Court should exercise its recognized prerogative.

If, as a result, new rules of evidence or new modes of treatment for the partly defective must be devised, our system of criminal jurisprudence will be that much further enlightened. Such progress clearly outweighs any temporary dislocation of settled modes of procedure. Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization.

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

Mr. Justice RUTLEDGE, dissenting.

A revolting crime, such as was committed here, requires unusual circumspection for its trial, so that dispassionate judgment may have sway over the inevitable tendency of the facts to introduce prejudice or passion into the judgment. This means that the accused must not be denied any substantial safeguard for control of those influences. A trial for a capital offense which falls short of that standard, although unwittingly, does not give him his due.

Congress introduced the requirements of premeditation and deliberation into the District of Columbia Code, Title 22, §§ 2401, 2404, in 1901. 31 Stat. 1321, with which compare Rev. Stat. § 5339. I do not think it intended by doing so to change the preexisting law only in cases of intoxication. Hence, I cannot assent to the view that the instructions given to the jury were adequate on this phase of the case. I think the defendant was entitled to the requested instruction which was refused or one of similar import.

I have no doubt that the trial court declined to give it believing that it was not required, perhaps also that it would be erroneous. For the fair-minded and able assistant district attorney who argued the case here conceded, with characteristic candor, that the courts of the District have consistently limited the effect of the controlling Code provision, by way of changing the preexisting law, to cases of intoxication. But, for the reasons in the opinion of Mr. Justice MURPHY, I do not think Congress intended the change to be restricted so narrowly. Accordingly I join in that opinion.

Apart from this defect, the instructions given were correct as far as they went. They were however in wholly abstract form, which in some cases might be sufficient. But the issues of premeditation and deliberation were crucial here on the question of life or death. A more adequate charge, I agree with Mr. Justice FRANKFURTER, would have pointed up the evidence, at least in broad outline, in relation to those issues.

Because I think the charge was deficient in not including the requested instruction or one substantially similar, thus in my opinion failing to meet the standard set by Congress in the Code, and because the effect of this deficiency was magnified by the failure to point up the instructions given in some more definite relation to the evidence, I think the judgment should be reversed.